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In the

Supreme Court of the United States

TRENDI SPORTSWEAR, INC.,

Petitioner,

v.

BANK OF INDIA, INDU CRAFT, INC.,
The BANK OF BARODA,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a bankruptcy court's judgment against the debtor entered pursuant to a reorganization plan, which judgment and plan have become final and binding, be held to be unenforceable? Is such a decision, which unravels the entire reorganization plan, an impermissible collateral attack on the bankruptcy court's decisions and so far a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power?

2. Are the lower Courts' decisions – that a defendant third party plaintiff's assertion of direct claims against a fourth-party defendant under Rule 14, Fed. R. Civ. P., do ***not*** relate back to the commencement of the fourth-party action although they arise out of the same transactions – in direct conflict with the decision of New York's highest Court in Duffy v. Horton Memorial Hospital, 66 N.Y.2d 473, 497 N.Y.S.2d 890, 488 N.E.2d 820 (1985)?

3. Can a third-party plaintiff's claims against a fourth-party defendant under Rule 14, Fed. R. Civ. P., be held to accrue on 3 different dates for purposes of statute of limitations depending on whether such claims were (a) not formally asserted, or (b) asserted in an amendment to the existing third-party complaint, or (c) asserted in a separate pleading in the same proceeding, although the claims arise out of the same transactions underlying the timely fourth party complaint? Is this an important question of federal law that has not been, but should be,

settled by this Court?

PARTIES TO THE PROCEEDING

Trendi Sportswear, Inc. ("Trendi") and Indu Craft, Inc. ("Indu Craft") are both New York corporations, with no parent or subsidiary corporations. No publicly held corporations own 10 percent or more of the stock of either corporation.

Bank of Baroda ("Baroda") is a bank organized under the laws of India. It is owned and controlled by the Government of India.

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Bank of India v. Trendi Sportswear, Inc., 64 Fed. Appx. 827, 2003 U.S. App. LEXIS (2nd Cir. May 15, 2003), A-1a.

Bank of India v. Trendi Sportswear, Inc., 2002 U.S. Dist. LEXIS 894 (S.D.N.Y. Jan. 18, 2002), A-18a ("January 18th Order")

Bank of India v. Trendi Sportswear, Inc., 2002 U.S. Dist. LEXIS 14801 (S.D.N.Y. Aug. 12, 2002), A-7a ("August 12th Order").

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). The United States Court of Appeals for the Second Circuit entered its decision on Trendi's and Indu Craft's appeals on May 15, 2003. Trendi and Indu Craft petitioned that Court separately for rehearing, and rehearing *en banc*. Both petitions were denied by orders entered on July 7, 2003. This petition is filed within 90 days of the date of entry of those orders denying rehearing, and is hence, timely. Rule 13.1, Sup. Ct. R.

RELEVANT PROVISIONS

11 U.S.C. §§ 524 (a)(1), (e); 1123(b)(3)(B); 1129(a)(7)(A) (ii); Rule 14, Fed. R. Civ. P.

STATEMENT

Trendi petitions for a writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Second Circuit which affirmed, by a Summary Order, the Judgment of the United States District Court for Southern District of New York (Hon. John S. Martin, Jr., J.), entered April 11, 2002, A-129a, and the two underlying orders, January 18, 2002, A-18a, and August 12, 2002, A-7a, which dismissed Indu Craft's Amended Fourth-Party Complaint, and Trendi's Second Third Party Complaint respectively. The Second Circuit gave no reasons of its own, but simply affirmed "***largely*** for the reasons stated in the opinions of the District Court," A-6a (emphasis added).

The Underlying Action, 1990 Stay, Jury Verdict Against Baroda For Bad Faith Lender Liability in the 1987 Action

BOI (Baroda's sister bank)[1], brought the underlying action against Trendi in September 1989 based on Trendi's alleged default on its financial obligations to BOI. Trendi in turn asserted third party claims against its supplier and then-sister corporation, Indu Craft, asserting that Trendi's default was caused by Indu Craft's failure to supply Trendi with ladies' garments as contracted for. Indu Craft impleaded Baroda in a fourth party complaint, asserting derivative claims for bad faith lender liability.

The District Court stayed this action in 1990, at Baroda's instance, pending conclusion of Indu Craft's

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[1]BOI has not participated in any proceedings herein for several years, and is accordingly, not a party to these proceedings.

earlier action against Baroda ("the 1987 Action"). Eventually, Indu Craft prevailed in the 1987 Action, a Manhattan jury holding that Baroda had acted maliciously and in bad faith in connection with Indu Craft's credit facility. After further proceedings and appeals, when it came time to pay that judgment, Baroda acted in concert with BOI to keep those funds from Indu Craft and to deposit them in Court, which led to a slew of claims against Indu Craft and forced it into bankruptcy. Meanwhile, in this action, Baroda's sister bank BOI obtained judgment against Trendi for over $2.4 million in 1991. That judgment remains unsatisfied.

The Bankruptcy Proceedings: Reorganization Plan Confirmed Based Substantially On Recovery On Fourth Party Claims Herein

In Indu Craft's Bankruptcy proceedings, it submitted a reorganization plan to the Bankruptcy Court on March 24, 1999. That plan ***clearly*** contemplated prosecution of Indu Craft's fourth party claims herein, and payment to creditors from any recovery therefrom:

> Trendi, ANZ and Hemant Mehta, the holders of Claims in Class 5, ***shall receive their net proceeds of any recovery in Baroda II [i.e., the fourth party claims in this action]***, after deduction for the reimbursement to Tze Wong Consultants, Ltd., of its funding of the Plan, ***the funding of the Baroda II litigation*** pursuant to a future agreement, legal fees, costs and disbursements.

A-87a-88a ¶5.2. It also proposed to discharge Indu Craft

from all liability "except as otherwise provided under the Plan," A-77a ¶9.1.

Trendi agreed to that plan on the express condition that (a) Indu Craft consented to entry of judgment in Trendi's favor in the amount adjudicated by the Bankruptcy Court, and (b) Trendi "shall receive" the net proceeds of any recovery in the fourth party claims in this action, A103a-104a¶1.

Five days later, on March 29, 1999, a modification agreed to between all the creditors and Indu Craft, and accepted by the Bankruptcy Court ("so ordered") provided that

a. a "new loan" of $600,000 would be made to Indu Craft for, *inter alia*, "the prosecution of post-Effective Date claims, including but not limited to," the fourth party claims herein A-85a ¶1.37;
b. Indu Craft would issue promissory note and security interest in all its property, "including but not limited to, the proceeds generated from [the fourth party claims in this action]," A-87a¶ c);
c. For repayment of the "new loan", "Tze Wung shall receive the first proceeds, in the amount of $500,000, generated by the successful prosecution or settlement of [the fourth party claims in this action]. . ." A-87a ¶(d);
d. Indu Craft "agrees to consent to judgment being entered against it in the third party action in Baroda II [i.e., this action] for the amount of Trendi's claim as determined by the Bankruptcy Court," A-88a ¶5.2;

e. Indu Craft "shall utilize" the new capital loan for paying creditors and the balance for the prosecution of claims "including but not limited to [the fourth party claims in this action]", A-88a ¶12(b).

The Bankruptcy Court confirmed the proposed reorganization plan as modified on the same day, A-101a. It made the requisite factual findings required by the Bankruptcy Code, and also entered the usual order that "Except as otherwise provided in the Modified Plan or a Final Order of the Bankruptcy Court," any judgment on a discharged debt was "null and void and of no force and effect", A-96a ¶F(1)(c).

Thereafter, the Bankruptcy Court adjudicated Trendi's claims against Indu Craft as required under the Plan. ***About ten months later, on January 18, 2000, that Court entered judgment in favor of Trendi against Indu Craft*** in the amount of $21,101,348.47, A-45a ("Bankruptcy Judgment").

While Baroda participated in Indu Craft's bankruptcy proceedings, A-105a-106a, disputed payments, A-111a-116a, and received notices even concerning the Reorganization Plan, A-108a-112a, it never disputed the Bankruptcy Court's findings or raised any issue concerning the Plan.[2]

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[2]Bankruptcy law requires any party in interest to object to a proof of claim or be forever bound by it. 11 U.S.C. §502(a); Rosenbaum v Dutton, 203 F 838 (8th Cir. 1913) (Parties in interest" include all persons who have interest in *res* which is to be administered); Power Five v GMC *(In re Automotive Armature Co.)* 219 BR 513 (S.D.Ind. 1998).

Proceedings Before the District Court, Trendi's Direct Claims Against Baroda

Meanwhile, in this action, the District Court lifted the 1990 stay, and awarded summary judgment to Baroda against Indu Craft based on *res judicata*. Upon reversal of that order by the Second Circuit, Bank of India v. Trendi Sportswear, Inc., 239 F.3d 428 (2nd Cir. 2000), Indu Craft amended its complaint as of right to assert RICO claims based upon evidence unearthed in criminal proceedings in India. Separately, Trendi served a Second Third Party Complaint asserting direct claims against Baroda based upon the same transactions.

Baroda moved for dismissal of Indu Craft's Fourth Party Complaint based on Indu Craft's alleged "discharge" under the Plan. By its January 18th Order, the District Court granted this motion, holding that "since Indu Craft had been discharged [by the Bankruptcy Court's order approving the Plan in March 1999] of its obligation to pay Trendi the [subsequent] judgment entered against it in the Bankruptcy proceeding and Trendi is barred from seeking to enforce that judgment against Indu Craft, Indu Craft's action for indemnification cannot succeed, as a matter of law, and must be dismissed," A-25a. Accordingly, it entered final judgment after dismissing Indu Craft's claims.

Trendi sought to vacate the final judgment because its direct claims against Baroda were still pending and unanswered. The District Court sought briefing on two specific issues: whether Trendi's claims against Baroda were time barred; and whether Trendi's impleader of Indu Craft was proper. After due briefing, by its August 12th Order, the District Court dismissed Trendi's direct claims against Baroda as time-barred.

According to the District Court, Trendi could assert direct claims against Baroda under Rule 14, Fed. R. Civ. P., in a separate pleading, but those claims were time-barred because the underlying actions took place in 1987. Moreover, Trendi's claims could not relate back because Trendi had to reopen the Bankruptcy Judgment against Indu Craft (presumably in the Bankruptcy Court) to assert a claim directly against Baroda in this action. Trendi had not done so, and could not do so now; hence, Trendi's claims could not relate back under Rule 15(c), Fed. R. Civ. P., and were untimely. Trendi appealed but the Second Circuit affirmed both opinions "largely" for the District Court's reasons.

Trendi petitions for a writ of certiorari. First, the District Court's January 17th Order unravels the entire Reorganization Plan approved by the Bankruptcy Court, and is an impermissible collateral attack on the Plan. This radical and unprecedented departure from well-settled law and practice was sanctioned by the Second Circuit. Second, the District Court's August 7th Order refusing to relate back Trendi's direct claims against Baroda based upon the same transactions as Indu Craft's claims is in direct conflict with the decision of the New York Court of Appeals in Duffy, 66 N.Y.2d 473, 497 N.Y.S.2d 890, 488 N.E.2d 820. Third, the time when a third party plaintiff's direct claim against a fourth party defendant accrues is an important issue of federal law which should be settled by this Court. The lower Courts' decisions make this depend entirely on the ***form*** in which the claim is raised, if it is asserted at all.

Original Jurisdiction of the United States District Court for the Southern District of New York was based upon diversity of citizenship, 28 U.S.C. §1332. Bank of India, the original plaintiff, was a citizen of India, while

Trendy was a citizen of New York, and the amount in controversy exceeded $75,000. Jurisdiction over the third-party and fourth party claims was based upon supplementary jurisdiction, 28 U.S.C. §1367, and Rule 14, Fed. R. Civ. P.

REASONS FOR GRANTING THE WRIT

I. The Courts' Decisions Unraveled the Entire Reorganization Plan Duly Confirmed by the Bankruptcy Court and Which Plan Had Become Final and Binding

The lower Courts' decisions used one clause of the Bankruptcy Court's order which confirmed the Plan to eviscerate that very Plan, and to render meaningless a judgment entered pursuant to the express terms of that Plan by the Bankruptcy Court itself. As detailed below, this is so radical a departure from settled law and practice that, to borrow Justice Scalia's words, "the phenomenon calls into question whether . . . it any longer makes sense to talk of 'a government of laws, not of men.'" Patterson v. Shumate, 504 U.S. 753, 766 (1992)

A. The Plan's Central Plank Was The Continued Prosecution of, and Potential Recovery From, Indu Craft's Fourth Party Claims Herein

No serious question can exist that Indu Craft's asset – its fourth party claim against Baroda herein – was pivotal to the Plan. Trendi and other creditors agreed to the Plan relying on this asset, and the orders of the Bankruptcy Court thereon. The lower Courts' decisions hold, in effect, that the Bankruptcy Court took away with one hand what it gave with the other.

Extremely telling, the Bankruptcy Court's Order required another creditor, Tze Wung, to advance new funds ($500,000) to finance prosecution of Indu Craft's claims here. A-87a ¶5.1(c). This order was ***clearly*** within its jurisdiction, and within the express terms of the bankruptcy statute. 11 U.S.C. §1123(b)(3)(B) ("a plan may . . . provide for . . . the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any . . . claim or interest"); Citicorp Acceptance Co. v. Robison (In re Sweetwater), 884 F.2d 1323, 1327 (10th Cir. 1989); Duvoisin v. East Tenn. Equity Ltd. (In re Southern Indus. Banking Corp.), 59 Bankr. 638, 642 (Bankr. E.D. Tenn. 1986) ("[The] aim [of section 1123(b)(3)(B)] was to make possible the formulation and consummation of a plan before completion of the investigation and prosecution of causes of action . . . Thus, the statute was in furtherance of the purpose of preserving all assets of the estate while facilitating confirmation of a plan.").

Indeed, if such post-confirmation prosecution of claims was proscribed by the very confirmation of the Plan, as the Ninth Circuit observed,

> debtors undoubtedly would delay filing plans of reorganization until completing all potential litigation, a result that would contravene the Bankruptcy Code's goal of quick and equitable reorganization. Cf. Tennessee Wheel & Rubber Co. v. Captrol Corp. Air Fleet (In re Tennessee Wheel & Rubber Co.), 64 Bankr. 721, 727 (Bankr. M.D. Tenn. 1986) ("Defendants' theory would not permit the administration of bankruptcy estates in the common

> situation . . . where the general unsecured claimholders have accepted cash soon after confirmation, but other classes of creditors and interestholders await payment for months or years after confirmation. . . . [That result would conflict with] Chapter 11[, which] provides debtors with great flexibility in the design and execution of plans of reorganization."), aff'd, 75 Bankr. 1 (M.D. Tenn. 1987)

Acequia, Inc. v. Clinton (In re Acequia, Inc.), 34 F.3d 800, 808 (9th Cir. 1994). Accord, Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548 (3rd Cir. 2003); McFarland v. Leyh (In re Texas Gen. Petroleum Corp.), 52 F.3d 1330 (5th Cir. 1995). While the lower Courts held that Indu craft was not bound to prosecute these claims here, A-25a, and that ***Trendi*** "may have made an ill-advised agreement, which did not take account of New York law regarding indemnification," A-14a, it didn't explain why the Bankruptcy Court ordered Tze Wung to finance this litigation.

So also, ***much after the discharge***, the Bankruptcy Court held hearings, quantified Indu Craft's liability to Trendi, and entered judgment thereon ***about 10 months later***. The lower Courts' decision now hold that the Bankruptcy Judgment was a worthless piece of paper.

B. The Reorganization Plan Was Not Subject to Selective Nullification by the lower Courts

The District Court was exercising its Diversity Jurisdiction under 28 U.S.C. §1332. As such, the District Court was "in effect, only another court of the State [where it sits]. . . ." Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) (citations omitted); accord, Levinson v. Deupree, 345 U.S. 648, 653 (1953). The District Court was ***not*** sitting in appeal under 28 U.S.C. §158 over the Bankruptcy Court's decisions; that appellate jurisdiction lies ***only*** when the mandated procedure is followed with prescribed filings. See Smith v. Barry, 502 U.S. 244, 248 (1992) (appellate court's rules concerning notice of appeal "are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review.").

Indisputably, the decisions of a court of competent jurisdiction ***must*** be respected in all collateral proceedings. As the Fourth Circuit observed in a marginally different context,

> The problem with the reasoning of New Horizon is that it ignores the fact that the order of the bankruptcy court of February 6, 1997 was a final order because it was not appealed from on or before 10 days thereafter pursuant to 28 U.S.C. § 158(a) and § 158(c) and Rule 8002 of the Bankruptcy Rules. See also Bankruptcy Rule 9020 and In re Walters, 868 F.2d 665 (4th Cir. 1989). Thus, the claim in the complaint in this case that jurisdiction is established under 28 U.S.C. § 1334(b) as a

> related to case under Title 11 because of its claim that the defendants were guilty of civil contempt of the Bankruptcy Court depends for its success on a collateral attack on a final order of the bankruptcy court, which two opinions of the United States Supreme Court, Celotex Corp. v. Edwards, 514 U.S. 300 (1995), and Oriel v. Russell, 278 U.S. 358 (1929), have decided is not permissible.

New Horizon v. Jacobs, 231 F.3d 143, 152 (4th Cir. 2000)

Finality of orders concerning reorganization plans is particularly significant, given the third party interests at stake. As the Court observed in Corbett v. MacDonald Moving Services, Inc., 124 F.3d 82 (2nd Cir. 1997),

> ***These finality interests are particularly important in the bankruptcy context, where numerous contending claims and interests are gathered, jostle[d], and are determined and released.*** . . . Thus MacDonald's contribution did confer a benefit on the unsecured creditors, and ***MacDonald cannot be extricated from the Plan without impairing the rights of the unsecured creditors. In any event, it cannot be denied that a judgment in favor of the Trustees in this case would "impair, destroy, challenge, or invalidate the enforceability or effectiveness" of the Reorganization Plan at least insofar***

> ***as that Plan settles the amount, source and payment schedule of the obligation that is the subject of this lawsuit***. See Sure-Snap [Corp. v. State Street Bank & Trust Co.], 948 F.2d [869] at 870 [(2nd Cir. 1991)](claims "whose timely bringing may have affected the parameters of a bankruptcy repayment schedule cannot be re-litigated another day in another court").

124 F.3d at 91-92 (emphasis added). See also Sure-Snap, 948 F.2d at 872-73 (2nd Cir. 1991) (order confirming reorganization plan has preclusive effect under doctrine of res judicata); In re Justice Oaks II, Ltd., 898 F.2d 1544, 1550 (11th Cir. 1990) ("This issue has been settled for some time: a bankruptcy court's order confirming a plan of reorganization is given the same effect as any district court's final judgment on the merits."); Republic Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987) (creditor was barred from attacking the legality of confirmation in a collateral proceeding).

By nullifying the Bankruptcy Judgment and other portions of the Plan, the lower Courts effectively voided the entire Reorganization Plan, and Trendi's and other creditors' consideration for having agreed thereto. Such nullification in collateral proceedings is unheard of, and contrary to well-settled practice. Robertson v. Isomedix, Inc. (In re International Nutronics, Inc.), 28 F.3d 965, 969-71 (9th Cir.), cert. denied, 513 U.S. 1016 (1994) (*res judicata* bars antitrust claim by debtor against purchasers of debtor's property pursuant to sale approved by order of bankruptcy court); Hendrick v. Avent, 891 F.2d 583, 587 (5th Cir.), cert. denied, 498 U.S. 819 (1990) (dismissing RICO and fraud claims where

"the determination by the bankruptcy court [was] the final authorization of the transfer of title and the subsequent adversary proceeding [was] a direct challenge to that transfer of title" because "the proper medium for a challenge to the original bankruptcy court's order is through a direct challenge of that order"); Gekas v. Pipin (In re Met-L-Wood Corp.), 861 F.2d 1012, 1018 (7th Cir. 1988), cert. denied, 490 U.S. 1006 (1989) (affirming dismissal of fraud suit as impermissible collateral attack on bankruptcy court's order and "hold[ing] that confirmed sales–which are final judicial orders–can be set aside only under rule 60(b)"); Southmark Properties v. Charles House Corp., 742 F.2d 862, 870-72 (5th Cir. 1984) (*res judicata* barred breach of contract claims asserted by bankruptcy seller against purchaser of real estate pursuant to court-approved sale); FCC v. NextWave Pers. Communs., Inc., 537 U.S. 293 (2003) (upholding bankruptcy court's decision which voided FCC's cancellation of spectrum licenses).

The Lower Courts Negated Several Factual Findings By the Bankruptcy Court In An Impermissible Collateral Attack on a Confirmed Plan

For approving the Plan, the Bankruptcy Court made several findings of fact, which it was statutorily required to do. The lower Courts' decisions effectively negated several of these findings:

1. The Bankruptcy Court expressly found that each creditor or interested party had "accepted" the Plan or would "receive or retain" more than liquidation value, A-93a ¶11.

The lower Courts negated ***both*** prongs of this finding. First, Trendi's (and other creditors') acceptance was obviously conditioned on viability of the fourth party claims herein and if those claims were nullified, their acceptance is void for mutual mistake of an extremely material item. Wastak v. Lehigh Valley Health Network, 333 F.3d 120 (3rd Cir. 2003); Villines v. GMC, 324 F.3d 948 (8th Cir. 2003).

Second, Trendi and other creditors would certainly have received a much higher value if Indu Craft were to be liquidated under Chapter 7, and, the lower Courts made the Plan fail the "best interest of creditors test." Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 441 (1999); 11 U.S.C. §1129(a)(7)(A)(ii). Indisputably, Indu Craft would ***not*** have been discharged in a Chapter 7 liquidation, 11 U.S.C. § 727(a)(1), and would have continued to be liable to Trendi, whereupon Indu Craft could have recovered upon its claims against Baroda.

The Bankruptcy court also ordered

2. That a creditor, Tze Wung, give Indu Craft a loan of $500,000, which loan was secured by, *inter alia*, the proceeds herein, A-87a ¶5.1(c);
3. That Tze Wung "shall receive the first proceeds" of $500,000 from any recovery herein, A-87a¶(d);
4. That Trendi, and other class 5 holders "shall receive their net proceeds of any recovery" herein, after reimbursing Tze Wung for loans for pursuing the claims herein, A87a-88a¶5.2;
5. That Indu Craft's liability to Trendi would be determined by the Bankruptcy Court, and judgment would be entered in that amount, id.
6. Indu Craft "shall utilize the proceeds" of the New

Capital loan to pay for this litigation, A88a¶12.

Every one of the above provisions was effectively voided by the lower Courts' decisions. Moreover, the Bankruptcy Court also found that

7. That the Plan "complied with all applicable provisions of the Bankruptcy Code," A-92a, ¶4;
9. That the Plan had been proposed "in good faith and not by any means forbidden by law and viewed in the light of the totality of circumstances, . . . will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code," A-92a, ¶5; and
10. That the Plan is "consistent with the interests of creditors and equity holders and with public policy," A-92a ¶9;

Each of the above findings were rendered baseless by the lower Courts. This is manifestly inconsistent with settled law and practice.[3]

11. The actual discharge clause itself expressly provided that "***Except as otherwise provided*** in the Modified Plan or a Final Order of the Bankruptcy Court," any judgment on a discharged debt was "null and void and of no force and effect", A-96a F(1)(c) (emphasis aded). The specific provisions for funding the fourth party litigation herein, the security interests created, and the disbursements of proceeds therefrom, detailed above were clearly such clauses which provided "otherwise" – which provisions were negated by the decisions at issue.

Moreover, the confirmed Plan was a binding agreement between all parties, 11 U.S.C. § 1141(a); In re Pettibone Corp., 134 B.R. 349, 351-352 (Bankr. N.D. Ill.

1991) ("A plan of reorganization is a contract which binds a debtor and its creditors.").[4] As such, it is well-settled that a contract which confers certain rights or benefits in one clause will not be construed in other provisions completely to undermine those rights or benefits

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Ronnen v. Ajax Elec. Motor Corp., 88 N.Y.2d 582, 590, 648 N.Y.S.2d 422, 425, 671 N.E.2d 534, 537 (N.Y. 1996) (citing Two Guys from Harrison- N.Y. V. S.F.R. Realty Assocs., 63 N.Y.2d 396, at 405, 482 N.Y.S.2d 465, 472 N.E.2d 315 (N.Y. 1994); Premium Point Park Assn. V. Polar Bar, 306 N.Y. 507, 511, 119 N.E.2d 360 (N.Y. 1954). The lower Courts' decisions effectively negated months of strenuous negotiations between creditors and debtor, and nullified the ***clear and demonstrable*** intent of the bankruptcy court and the parties.

The significance of this petition can hardly be overemphasized, given the massive bankruptcy filings currently pending involving such multibillion dollar giants as Enron, Worldcom, and Adelphia. Each of these bankruptcies presumably involve tens of thousands of claims, creditors, and choses-in-action.[5] Permitting a court to re-interpret a Bankruptcy Court's considered, clear decisions and to unravel a duly confirmed reorganization plan is an invitation to chaos.

Where a Bankruptcy Court's Judgment Against a Debtor Is in Apparent Conflict with its Own Prior Order Approving the Reorganization Plan, That Apparent Conflict ***Must*** Be Resolved By the Same Bankruptcy Court In the First Instance

Indisputably, the bankruptcy court's jurisdiction over a debtor's properties "is paramount and exclusive." Brown v. Gerdes, 321 U.S. 178, 183-84 (1944) (citing Gross v. Irving Trust Co., 289 U.S. 342 (1933))[6]. As this

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[3]"[C]onfirmation of a plan of reorganization discharges the debtor firm all claims arising prior to the date of confirmation, subject to the following exceptions: . . .

To the extent that the plan or order of confirmation provides for payment of a claim, such claim is not discharged". Collier on Bankruptcy, ¶1141.01 (15th ed. 1994)).

[4]In re Ernst, 45 B.R. 700, 702 (Bankr. D. Minn. 1985) ("The plan is essentially a new and binding contract, sanctioned by the court, between the debtor and his preconfirmation creditors."); accord, In re Xofox Industries Ltd, 241 B.R. 541-543 (Bankr. E.D Mich. 1999); In re Herron, 60 B.R 82 (Bankr. W.D.La. 1986); In re St. Louis Freight Lines, Inc., 45 B.R. 546 551 (Bankr. E.D. Mich. 1984); In re Paradise Valley Country Club, 31 B.R. 613 (D.Colo. 1983).

[5]Bankruptcy filings have increased from 312,335 in the first quarter of 2000 to 440,257 in the second quarter of 2003. http://www.abiworld.org/stats/newstatsfront.html. (American Bankruptcy Institute).

[6]Accord, In re Union League Club of Chicago, 203 F.2d 381, 386 (7 Cir. 1953) (reorganization decree conclusive on questions which might have been raised as well as to those litigated); Murphy v. John Hofman Co., 211 U.S. 562 (1909) (De facto verdict for creditor in replevin action to obtain goods of debtor after bankruptcy was filed reversed because the action was an unlawful invasion of the bankruptcy court's jurisdiction which could not be disturbed by another court); United States Fidelity & Guaranty Co. v. Bray, 225 U.S. 205 (1912) (surety company's claims against

Court held over 160 years ago,

> In every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a superior authority; and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding.

Cocke v. Halsey, 41 U.S. 71, 87 (1842); accord, Harris v. Hardeman, 55 U.S. 334 (1853).

For example, in Wegner v. Grunewaldt, 821 F.2d 1317, 1320 (8th Cir. 1987), Wegner agreed to a buyout of his interest in BLT, and consented to BLT's transfer of its liquor license to a new corporation BLT II. His dues were secured by a security interest in BLT's liquor license. Meanwhile, Valley National Bank financed BLT II and took a security interest in the same assets. In bankruptcy proceedings of BLT and BLT II, the Bankruptcy Court held that Wegner's security interest, although filed prior in time, was subordinate to Valley National's because (a) under 9-306(2) of South Dakota's UCC, he authorized and consented to the transfer; and (b) as a BLT officer, he did not inform Valley National of his security interest, and hence, his interest was equitably subordinated. 821 F.2d at 1319-20. On appeal, the District Court rejected these findings, and held that Wegner authorized the sale on condition that he retain his security interest, and state law permitted the

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debtor's estate were "subjects for proceedings in bankruptcy and therefore fell within the exclusive jurisdiction of the court of bankruptcy")

security interest to continue in the transferred asset. 821 F.2d at 1320. On appeal, the Eighth Circuit reversed:

> If the bankruptcy court's factual findings are silent or ambiguous as to an outcome determinative factual question, the district court may not engage in its own factfinding but, instead, must remand the case to the bankruptcy court for the necessary factual determination.

Wegner, 821 F.2d at 1320 (citing In re Walker, 726 F.2d 452, 454-55 (8th Cir. 1984); In re Neis, 723 F.2d 584, 588-90 (7th Cir. 1983).

-Moreover, the issue there presented a serious inconsistency remarkably similar to the one here. As the Eighth Circuit explained, 821 F.2d at 1321:

> Yet, if we accepted the bank's argument, we would be forced to inconsistently conclude that when a secured party and a debtor agree that the debtor may sell the secured property and also agree that the security interest shall continue in the sold property, the first agreement is valid, the second is meaningless, and, despite the parties' manifestations, the secured party loses his property interest in the sold property. Not only would such an interpretation ignore the parties' intentions, it would also be at odds with section 9-306(2)'s policy of extending, not limiting, the protections Article 9 affords a secured party.
> Clearly, the interpretation of reorganization

plans, and the fate of specific claims or the debtors' properties therein, remains exclusively with the Bankruptcy Court. See, e.g., In re. Clipper International Corp., 154 F.3d 565, 568 (6th Cir. 1998) (only bankruptcy court could direct disbursement of dividend distribution from overpayment of premiums made pre-petition, and Michigan court's orders "cannot be accorded deference"); cf. Nichols v. Alker, 231 F.2d 68, 76 (2nd Cir. 1956) ("the express grant of such power to an enforcing court under the P.U.H.C.A., like the similar provisions in the Bankruptcy Act, strongly suggests Congressional intent to immunize enforcement decrees from such attack.").

Indeed, even where a bankruptcy court's decision is ***directly*** at issue in appeal before the District Court, settled law and practice requires that the District Court defer to the opinions of the Bankruptcy Court as the court of first instance. In re Lawrence, 293 F.3d 615, 625 (2nd Cir. 2002) ((emphasis added) ("discretion was constrained by an obligation to consider the views of the court that entered the original order.")

Here, the Bankruptcy Court approved a reorganization plan that indisputably did not intend to discharge Indu Craft of its liability to Trendi. The validity of the Plan or the enforceability of any orders entered therein were never at issue before the District Court. Nevertheless, the lower courts ran roughshod over the Bankruptcy Court by holding that orders confirming the Plan and discharging Indu Craft rendered meaningless parts of that very order, as well as the subsequent judgment in favor of Trendi. This re-interpretation impermissibly intruded on the exclusive jurisdiction of the Bankruptcy Court herein, and are a remarkable departure from usual course of judicial

proceedings.

B. The Decision Creates an Unprecedented Concept in Law, a Schizophrenic Judgment Which Is Valid as Against the Judgment Creditor And Void Against the Judgment Debtor

The lower Courts held that the Bankruptcy Judgment in favor of Trendi against Indu Craft was valid, so that Trendi ***must*** have that Judgment vacated in order to assert claims against Baroda. Simultaneously, they also held that the ***same*** Judgment was not ***"collecti[ble]"*** from Indu Craft, A-14a (emphasis in original).

In other words, according to this proposition, a judgment could be valid as against the judgment-creditor but void as against the judgment-debtor. The lower Courts did not cite or explain (and we could not find) any legal basis for such a schizophrenic judgment. This is a dangerous precedent for an unheard of concept with tremendous potential for mischief.

Axiomatically, a judgment ***must*** be either valid and enforceable, or invalid and unenforceable, ***as against both***, the judgment-creditor ***and*** the judgment-debtor. Holding it valid against one but invalid against the other converts it into a weapon for perverse legal consequences. Thus, if a judgment is invalid ***only*** as against the judgment-creditor, then a claim can be the subject of repeated litigation against the judgment debtor. And if the judgment is invalid ***only*** as against the judgment-debtor, then the judgment-creditor is left with a worthless piece of paper.

Of course, judgments are occasionally

uncollectible ***practically*** for want of assets. But to hold a judgment to be ***legally*** uncollectible is the same as holding it to be void, and the District Court's attempted distinction between "void" and "uncollectible" is "sheer sophistry", to borrow this Court's characterization in Nixon v. Administrator of General Services, 433 U.S. 425, 516 (1977).

II. The lower Courts' Decision Concerning Trendi's Direct Claims Against Baroda Directly Conflicts with the New York Court of Appeals' decision in ***Duffy V. Horton Memorial Hospital***

Duffy, 497 N.Y.S.2d 890, involved a medical malpractice action brought in August 1979 against the hospital in New York State court. In June 1981, the hospital brought a timely third-party action against Dr. Greenberg. After Dr. Greenberg's deposition was taken in October 1982, that plaintiff sought to amend the complaint to assert direct claims against him. Rejecting a challenge based on the statute of limitations, New York's highest court reasoned that if the "new defendant has been a complete stranger to the suit up to the point of the requested amendment," the claim might be barred. 497 N.Y.S.2d at 893, citing Arnold v Mayal Realty Co., 299 NY 57 (N.Y. 1949); Bringing in Party – Limitations, Ann., 8 A.L.R.2d 6, §§ 53, 58). However, where, within the statutory period, a potential defendant is fully aware that a claim is being made against him with respect to the transaction or occurrence involved in the suit, and is, in fact, a participant in the litigation, permitting an amendment to relate back would not necessarily be at odds with the policies underlying the Statute of Limitations (Boyd v United States

Mtge. & Trust Co., 187 N.Y. 262, 270, [79 N.E. 999 [1907]]; cf. Williams v United States, 405 F2d 234, 236-237 [5th Cir. 1968]).

497 N.Y.S.2d at 893. Since Dr. Greenberg had been served with the third party complaint and "all prior pleadings in the action," he had "actual notice of the plaintiff's potential claim" when he was first brought in as a third party defendant by the original defendant, the hospital. 497 N.Y.S.2d at 893. Consequently, Dr. Greenberg had to "gather evidence and vigorously prepare a defense. There is no temporal repose." Hence, the New York Court of Appeals declared categorically:

a direct claim [could be] asserted against the third-party defendant, which, for the purposes of computing the Statute of Limitations period, relates back to the date of service of the third-party complaint.

497 N.Y.S.2d at 893 (citations omitted).

Here, Baroda had "actual notice" of Trendi's claims when Baroda was impleaded herein in 1990. It has been served with all pleadings herein, it knew that it had to gather evidence (and did so), and had to prepare a defense. Indisputably, Baroda has done so, and launched a vigorous defense. Thus, no serious question can exist that had this case proceeded in New York courts, Trendi's claim would have been upheld as timely. Nevertheless, the lower Courts held otherwise, and refused to relate them back.

The District Court was exercising Diversity Jurisdiction here. Indisputably, as such, it was "in effect, only another court of the State" which could not "substantially affect the enforcement of the right as given by the State." Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 109 (1945); accord, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956). As this Court declared categorically,

[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996) (quoting Guaranty Trust Co. of N.Y., 326 U.S. at 109 and citing Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949). See also Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202 (1956) (Even "Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases"). The lower Courts' refusal to relate back Trendi's direct claims against Baroda (the Second Third Party Complaint) was directly in conflict with Duffy.

The Lower Courts' Decision Creates Three Different Statutes of Limitations for the Same Claim under Rule 14, Depending Entirely on Whether The Claims Are Formally Asserted, and If So, How

A third party plaintiff may recover from the fourth party defendant in 3 ways. Firstly, it ***need not*** assert such a claim formally, but may still recover. Project Hope v. M/V Ibn Sina, 250 F.3d 67, 76-77 (2nd Cir. 2001) ("a formal amendment of a plaintiff's complaint asserting causes of action against a party impleaded under Rule 14(a) is unnecessary if the third-party is effectively on notice that it will be held liable on the plaintiff's claims and the two proceed against one another in an adverse manner"); accord, Wasik v. Borg, 423 F.2d 44, 46 (2nd Cir. 1970); Falls Indus., Inc. v. Consolidated Chem. Indus., Inc., 258 F.2d 277, 287 (5th Cir. 1958).

Here, Baroda was "effectively on notice" since 1990 that it would be held liable for Trendi's claims. Baroda and Trendi have always proceeded against one another in an adverse manner, right from Baroda's motion for stay or dismissal in 1990.[7] Thus, Baroda could be held directly liable to Trendi even if Trendi had ***not*** asserted a claim directly.[8] No question of statute of

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[7]For example, Trendi filed papers in opposition, and argued against, Baroda's motion for dismissal of Indu Craft's fourth party complaint. Trendi has appealed against the January 17th decision, and Baroda has sought dismissal of that appeal in this Court. Trendi filed direct claims against Baroda, A621.70, which are at issue. Similarly, earlier, Trendi had appealed against the lower Court's order granting Baroda's motion for summary judgment on grounds of res judicata. Baroda moved for dismissal of that appeal, and to strike Trendi's brief. In fact, Trendi and Baroda have always been on opposing sides in this action, whose thrust was always the recovery from Baroda of damages suffered by Trendi.

[8]No serious question can exist that Baroda had all the evidence concerning Trendi's damages, had conducted discovery concerning the same, and had bent over backwards to prevent litigation on the merits or recovery thereon. As the Second Circuit

limitations could arise at all.

Secondly, the third party plaintiff may formally assert a direct claim against the fourth party defendant without amending its pleading, Rule 14, Fed. R. Civ. P. In such case, as a corollary to settled law permitting direct recovery by a plaintiff against an impleaded third party, courts have related back such claims to the original impleader of the fourth party. For example, in Trace X Chemical, Inc. v. Gulf Oil Chemical Co., 724 F.2d 68 (8th Cir. 1983), cert denied, 469 U.S. 1160 (1985), Trace X sued Gulf Oil in January 1978 for the supply of defective TNT. Gulf asserted third party claims against its supplier, CIL, on July 18, 1980, but these claims were dismissed for want of personal jurisdiction. On March 12, 1981, Trace X asserted direct claims against CIL, which were beyond the 4-years prescribed under statute of limitations. However, the District Court held, the complaint against CIL was not time-barred because Trace X's claims against CIL "related back to the date of its January 26, 1978, complaint" against Gulf Oil. 724 F.2d at 70. The Eighth Circuit upheld this ruling. Id.

So also, Northbrook National Vending Co. v. J & R. Vending Corp., 167 F.R.D. 643 (E.D.N.Y. 1996), involved a diversity subrogation action for damages resulting from a fire on premises of Northbrook's insured (Tiffen) on April 2, 1993. Northbrook sued J & R, and, after 4 derivative claims in series, sought to assert claims against the fifth party defendant Robertshaw directly. Like Trendi here, Northbrook asserted "a direct claim against the third-party

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itself previously held, Trendi's damages had been deprived of a day in court, Baroda Bank Of India v. Trendi Sportswear, Inc., 239 F.3d 428 (2nd Cir. 2000).

defendant in a new pleading," 167 F.R.D. at 647. Robertshaw opposed Northbrook's claims on grounds of statute of limitations. The Court rejected this on grounds that, inter alia, an otherwise time barred claim could survive based on the "relation back" doctrine. As here, New York law applied to those claims, and New York law permitted such relation back. 167 F.R.D. at 648 (citing Duffy, 497 N.Y.S.2d 890, and Hemmings v. St. Mark Housing Association. L.P., N.Y.L.J. May 31, 1996 p. 28 cols. 3-4 (N.Y. Sup. Ct. Kings Co. 1996)). Since Robertshaw could demonstrate no prejudice, Northbrook's claims were not time-barred. 167 F.R.D. at 648.[9]

Here, Trendy formally asserted direct claims against Baroda based upon the same transactions as Indu Craft. However, the lower courts held that such a direct claim can be asserted only ***before*** the statute of limitations had run on Trendi's direct claims themselves, although Indu Craft's claims were timely. A-12a.[10]

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[9]See also Meredith v. United States, 41 F.R.D. 34 (S.D. Cal. 1966); Dysart v. Marriott Corp., 103 F.R.D. 15 (E.D. Pa. 1984); 6 C. Wright & A. Miller, Federal Practice & Procedure § 1498 (1971). Cfr., 131 Main St. Assocs. v. Manko, 897 F. Supp. 1507, 1521 (S.D.N.Y. 1995) ("Given that the added plaintiffs' claims in this case are identical to those of the original plaintiffs, defendants have not been prejudiced in their ability to mount a defense. The claims of the late-comer plaintiffs are therefore timely"); Koal Indus. Corp. v. Asland, S.A., 808 F. Supp. 1143, 1157 (S.D.N.Y. 1992) ("plaintiffs have been allowed to add or substitute parties where there is an extremely close corporate or other relationship between the original and the added defendant," (quoting 3 J. Moore, Moore's Fed. Practice, ¶15.08[5] (1992)).

[10]

This despite the Court acknowledging that Rule 14 (a) "does not impose a time limit within which the plaintiff must assert any claims that it may have against the third-party defendant." A-12a.

Third, a third-party defendant may amend the third-party complaint to assert a direct claim against the fourth party defendant. This option is clear from the advisory committee's notes:

> [T]he plaintiff may, if he desires, assert directly against the third-party defendant ***either by an amendment or by a new pleading*** any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

Rule 14, Advisory Committee's Notes, 1946 Amendment (emphasis supplied).

Here, the lower courts held that Trendy could not amend its third-party complaint in this action because of the Bankruptcy Judgment. That Judgment precluded amendment, and thence, the applicability of Rule 15 (c); hence, the Doctrine of Relation Back would not apply, according to the lower Courts.

Simply put, by the lower Courts' decisions, a third party's direct claims under Rule 14 against a fourth party defendant would be time-barred depending ***entirely*** on the form in which the claims were asserted:

1. If the claims were not asserted formally at all, they would not be time-barred in view of the fourth party claims;
2. If they were asserted by way of an amendment to the third party complaint, they would relate back to the fourth party complaint; but
3. If they were asserted by way of a direct pleading,

they would have to be independently timely.

This applicability of statutes of limitations is an important question off a federal law which should be settled by this court. The decisions at issue elevate form over substance, directly contrary to this Court's repeated admonition that "federal courts must not privilege form over substance." Carey v. Saffold, 536 U.S. 214, 202 (2002); accord, Mitchell v. Helms, 530 U.S. 793, 818 (2000).

CONCLUSION

For the foregoing reasons, Trendi's Petition for a Writ of Certiorari should be granted.

Dated: New York, NY
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NOV 0 4 2003

Nos. 03-535 & 03-541

IN THE

Supreme Court of the United States

INDU CRAFT, INC.,

Petitioner,

-and-

TRENDI SPORTSWEAR, INC.,

Petitioner,

v.

BANK OF BARODA,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Bank of Baroda is incorporated in the Republic of India and 66.26% of its shares are owned by the Government of India. No public company owns 10% or more of its shares.

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Respondent Bank of Baroda (the "Bank") submits this brief in opposition to the petitions of Indu Craft, Inc. ("Indu Craft") and Trendi Sportswear, Inc. ("Trendi") for writs of certiorari to review a Summary Order of the United States Court of Appeals for the Second Circuit which unanimously affirmed the dismissal of Indu Craft's fourth party action for indemnification, and Trendi's "Second Third Party Complaint." Pet. App. at 1a-6a.

Contrary to the assertions of Indu Craft and Trendi, the decisions of the Court of Appeals and the United States District Court for the Southern District of New York are not in conflict with the decisions of this Court, or of any other circuit, raise no novel or important federal question, and provide no compelling reason for review by this Court. Rather, the determinations of the courts below are based upon garden variety common law principles which preclude a claim for indemnification in the absence of a loss, and the settled and salutary rule that precludes the amendment of a pleading long after the expiration of the statute of limitations and the entry of judgment on the underlying claims. Pet. App. at 7a-17a, 18a-36a. Such decisions are undoubtedly correct and should not be disturbed.

COUNTER-STATEMENT OF THE CASE

A. The 1987 Action

The tortured history of this fifteen year-old litigation is detailed in the Summary Order of the Court of Appeals and the Opinions of the District Court dated August 7, 2002 and January 17, 2002 (Hon. John S. Martin), and need not be repeated here. Pet. App. at 1a-6a, 7a-10a, 19a-23a. Suffice it to say that this action is an outgrowth of a 1987 action entitled *Indu Craft, Inc. v. Bank of Baroda*, (87 Civ. 7379 (KTD)) (the "1987 Action") in which Indu Craft asserted various contract

and tort-based claims against the Bank. The case was tried in 1992, and resulted in a verdict in favor of Indu Craft that was ultimately paid in full by the Bank's deposit of the amount of the judgment in an interpleader action.[1] Pet. App. at 20a-21a; Resp. App. at 13a-14a.

B. The 1989 Action

In September 1989, Bank of India ("BOI") commenced an action against Trendi entitled *Bank of India v. Trendi Sportswear, Inc.* (89 Civ. 5996 (JSM)) (the "1989 Action") seeking payment on a promissory note.[2] In May 1990, Trendi filed a third-party action for common law indemnification against Indu Craft, its sister company, claiming that the breach by Indu Craft of a contract to supply goods caused Trendi to default in its obligations to BOI. Rather than move to dismiss Trendi's third-party action as not dependent upon the main claim filed by BOI,

[1] Like many of the argumentative and unsupported statements contained in the petitions, Indu Craft's assertion that the Bank's interpleader action was "contrived" and somehow "caused Indu Craft to file a Chapter 11 petition for bankruptcy relief" is flatly contradicted by the record. (Indu Craft Br. at 4) As stated by Indu Craft in its Disclosure Statement in support of its proposed Second Amended Plan of Reorganization, "The proximate cause of the decision to seek chapter 11 relief was **the Debtor's inability to consummate a settlement with the IRS**." (Emphasis added) Resp. App. at 14a.

[2] On January 29, 1991, the District Court granted BOI's motion for summary judgment, and on April 24, 1991 a judgment was entered in favor of BOI and against Trendi in the sum of $2,224,895.19. *See Bank of India v. Trendi Sportswear, Inc.*, 239 F.3d 428, 433 (2d Cir. 2000). By the time that Indu Craft consented to judgment in favor of Trendi in accordance with the terms of its Plan for Reorganization, the amount of Trendi's third-party claims against Indu Craft had mushroomed to $21,101,348.47. Pet. App. at 21a-22a.

and thus in violation of Fed. R. Civ. P. 14 (Pet. App. at 23a-24a), Indu Craft filed a fourth-party action against the Bank, seeking common law indemnification in the event that it was found liable to Trendi.[3] Pet. App. at 21a.

C. The Indu Craft Bankruptcy

On July 25, 1997, Indu Craft filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York in a proceeding entitled *In re Indu Craft, Inc.* (Bk. No. 97-44958 (JHG)) (the "Bankruptcy Action"). In its Plan of Reorganization (the "Plan"), Indu Craft proposed "payment in full" of all administrative, tax, priority and secured claims from the proceeds of the interpleader action commenced by the Bank, by which the Bank satisfied the judgment entered in the 1987 Action. Resp. App. at 3a. The Plan also contemplated

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[3] In a prior opinion in the 1989 Action, Judge Martin observed that the third-party claims previously asserted by Trendi against Indu Craft appeared to be "manufactured" and were nothing more than the "right pocket" suing the "left pocket." Resp. App. at 23a. That observation that was joined in by Judge Duffy in a prior opinion in the 1987 Action. *See Indu Craft, Inc. v. Bank of Baroda*, 87 Civ. 7379, 1991 WL 107438, at *5, n.2 (S.D.N.Y. June 11, 1991). A similar concern was raised by the Bankruptcy Judge in Indu Craft's subsequent bankruptcy proceeding, in which the Court stated,

> There are lots of things on this plan that are beginning to make me very, very nervous, the way the claims are, the insider problems. This may be a case that would well be served by either a Chapter 11 or Chapter 7 Trustee. If it goes through or not, I think the moment may come to have someone else take a look at this arrangement as it unravels before my eyes.

Resp. App. at 27a.

that the Class 5 subordinated creditors, including Trendi, would also share "pro rata" in the "distribution of the net proceeds of any recovery" in the fourth-party indemnity action ["Baroda II"] commenced by Indu Craft against the Bank.[4] Resp. App. at 8a-9a, 17a.

As detailed in the Plan, the possibility of any recovery by Trendi and the other holders of Class 5 Subordinated Claims was both speculative and remote. Thus, and as stated by Indu Craft in its description of the "Risk Factors" applicable to the Plan, "[t]here can be **no assurance** that the Debtor will recommence the litigation in Baroda II, **or that such litigation**, if commenced **would be resolved in the Debtor's favor**." (Emphasis added) Resp. App. at 17a-18a. Nevertheless, Indu Craft concluded that the Plan was "feasible" and in the best interests of all of its creditors, and recommended its approval.[5] Resp. App. at 2a, 18a, 22a.

As explained by Indu Craft in its disclosure statement, as of the "Effective Date" of the Plan, Indu Craft would be "discharged . . . from all Claims against and Interests in the Debtor" arising prior thereto. Resp. App. at 19a. Both the Plan and the disclosure statements further provided that all persons

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[4] Indu Craft had "ceased operations in November 1987," and the interpleader proceeds constituted its only asset. Resp. App. at 11a.

[5] In explaining why the Plan was "feasible," Indu Craft stated that "it must be demonstrated that consummation of the Plan in not likely to be followed by the liquidation or the need for further financial reorganization of the Debtor." Resp. App. at 18a. Indu Craft concluded that the Plan was "feasible" because it provided for distribution to holders of all "allowed" and "priority" claims from the "Interpleader Proceeds," and because Indu Craft "believes it will be able to make all payments required to be made pursuant to the Plan." Resp. App. at 18a.

or entities having such claims would be "precluded and enjoined" from asserting any such claims "against the Debtor and its successors, assets or properties." Resp. App. at 19a. Finally, all creditors were on notice that the Plan would constitute a "settlement and release" between and among Indu Craft and each of its creditors. Resp. App. at 21a.

On March 24, 1999, Indu Craft filed its Second Amended Plan of Reorganization, As Modified, which was ultimately adopted by Indu Craft's creditors and approved by the Court. Pet. App. at 85a-89a. The treatment of Trendi's unsecured claim was set forth in Article 5, Section 5.2 of the Plan which provided, in the preamble, that "Allowed Claims in Classes 4 and 5 are impaired and shall receive the following treatment under the Plan **in full settlement, release and discharge** thereof." (Emphasis added) Pet. App. at 64a. Under the Plan, Trendi and ANZ Sales, Inc. ("ANZ") were to share in the sum of $200,000, to be paid upon confirmation of the Plan, and Trendi, ANZ and Hemant Mehta, as the holders of claims in Class 5, were to share pro rata in the "net proceeds of any recovery" in the fourth-party indemnity action, after deduction of certain funding costs. Pet. App. at 87a-88a.

Article 9 of the Plan, entitled "**DISCHARGE AND RELEASES**," provided that on the "Effective Date," Indu Craft "**shall be discharged** . . . from all Claims against and Interests in Debtor" arising prior to the Effective Date, whether or not the holder of such a claim or interest had filed a proof of claim or had accepted the Plan. (Emphasis added) Pet. App. at 76a-77a. Section 9.1 (b) of the Plan further provided that "all Persons **shall be precluded and enjoined**" from asserting any claim against the Debtor. (Emphasis added) Pet. App. at 77a. In conformity with Section 524 of the Bankruptcy Code, the Plan also provided that "any judgment at any time obtained, to

the extent that such judgment is a determination of the liability of the Debtor with respect to any debt discharged pursuant to the Plan and section 1141(d)(1) of the Bankruptcy Code, **shall be null and void**. . . ." (Emphasis added) (Pet. App. at 77a. The Plan was confirmed by Order of the Bankruptcy Court dated March 29, 1999. Pet. App. at 90a-101a.

Because Trendi had filed a proof of claim in an "unknown amount," the Plan also set forth Indu Craft's agreement to "consent to judgment being entered against it in the third party action . . . for the amount of Trendi's claim as determined by the Bankruptcy Court." Pet. App. at 88a. This was consistent with the terms of a Stipulation and Order Governing Treatment of [Trendi's] Claim In Plan of Reorganization dated March 24, 1999, pursuant to which Trendi and Indu Craft agreed to certain modifications of the Plan, and Trendi agreed to vote in favor of the Plan. Pet. App. at 102a-104a. Pursuant to Section 11.1 of the Plan, the Bankruptcy Court retained jurisdiction to "[a]llow, disallow, determine, liquidate, classify or establish the priority" of any claim, including the determination of the amount of Trendi's claim so that in the event of "any recovery" by Indu Craft in this fourth-party indemnity action, the amount of Trendi's pro rata share of distribution could be ascertained. Pet. App. at 82a.

On June 10, 1999, Indu Craft and Trendi entered into a Joint Statement of Facts regarding Trendi's claim against Indu Craft (the "Joint Statement"). Resp. App. at 28a-32a. Pursuant to the Joint Statement, Indu Craft acknowledged that it had breached its contract with Trendi regarding the purchase and sale of certain garments. Resp. App. at 28a-32a. Indu Craft also consented to $20,480,275.04 of Trendi's proposed damage claim of $21,101,348.47. Resp. App. at 34a.

By Decision and Order dated July 12, 1999, the Bankruptcy Court fixed the amount of Trendi's claim as $21,101,348.47, the full amount sought by Trendi. Resp. App. at 33a-35a. On January 18, 2000, a final judgment in that amount was entered in favor of Trendi (the "Trendi Judgment").[6] Pet. App. at 45a. On May 17, 2000, a Final Decree was entered in the Bankruptcy Action, pursuant to which Indu Craft was "discharged and released from any and all claims of creditors," and the Chapter 11 Case was closed. Pet. App. at 3a, 9a; Resp. App. at 36a-37a.

D. The First Amended Fourth-Party Complaint

On March 29, 2001 – more than 10 years after the commencement of the 1989 Action – Indu Craft served an amended fourth-party complaint, purportedly as of right, to recover in indemnity for the amount of the Trendi Judgment. In addition to its prior claims for common law indemnity, Indu Craft also asserted new claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Pet. App. at 5a, 31a. The Fourth-Party Complaint was dismissed by Final Judgment entered April 11, 2002. Pet. App. at 8a.

E. Trendi's "Second Third-Party Complaint"

On July 30, 2001 – more than one-and-half years after the entry of the Trendi Judgment and some 14 years after the events giving rise to the 1987 Action – Trendi filed what purported to be a "Second Third Party Complaint," seeking for the first time

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[6] By any standard, the Trendi Judgment was collusive in nature. As found by the District Court, the Trendi Judgment "was entered pursuant to a stipulation in a context in which Indu Craft . . . had no incentive to litigate the amount of damages." Pet. App. at 28a.

to assert direct claims against the Bank. Pet. App. at 10a. Trendi did so without leave of court, and despite the fact that it lacked standing because it was no longer a party to the pending 1989 Action. Following the granting of the Bank's motion to dismiss the fourth party action, Trendi made an application to vacate the Final Judgment, which was denied. Pet. App. at 8a-17a.

THE DECISIONS OF THE COURTS BELOW

In dismissing Indu Craft's fourth party claims for indemnification, the courts below held that because Indu Craft sought indemnity with respect to a consent judgment rendered in favor of Trendi, its affiliate, but had received a complete discharge and release in bankruptcy from all claims of all of its creditors, including Trendi, Indu Craft had not suffered, and could not suffer, any cognizable loss and its claims for indemnity were legally insufficient. Pet. App. at 24a-27a. In reaching this conclusion, the District Court stated that it was "black letter law" that "an indemnification claim does not arise until the party seeking indemnification has an out-of-pocket loss to be reimbursed," and that the law "does not permit recovery on an indemnity claim where the party seeking indemnification has not suffered an out of pocket loss." Pet. App. at 24a, 27a. Because Indu Craft had been discharged from any obligation to pay Trendi, and Trendi was barred by the Plan from seeking to enforce the Trendi Judgment, except to the extent of any recovery in this action, the lower courts held that Indu Craft's indemnity claims could not succeed as a matter of law. Pet. App. at 25a.

The courts below further held that Indu Craft's claims under RICO were also barred by both *res judicata* and the four-year RICO statute of limitations. Pet. App. at 31a-34a. Because Indu Craft's First Amended Fourth Party Complaint alleges that all of the acts complained of occurred between 1984 and 1990,

Indu Craft was on inquiry notice of such claims "at the time that the 1987 Action was tried in 1992. . . ." Pet. App. at 31a-32a. The lower courts also rejected Indu Craft's contention that its RICO claims did not arise until the time of the Trendi Judgment, holding that the "injury, if any, took place when Indu Craft was originally 'exposed to civil liability'" as a result of the filing of Trendi's third-party complaint in 1990. Pet. App. at 33a.

With respect to the claims asserted by Trendi, the courts below held that Trendi's self-styled "Second Third Party Complaint" was not an amended pleading within the meaning of Fed. R. Civ. P. 15(a), but was an independent third party complaint pursuant to Fed. R. Civ. P. 14. Pet. App. at 12a-13a. Accordingly, Trendi had no right to amend its third party complaint with respect to claims previously asserted, and which had resulted in the entry of a final judgment in favor of Trendi and against Indu Craft on January 18, 2000. In a word, it was simply too late, in 2002, for Trendi to attempt to assert direct claims against the Bank which arose in 1987, and which Trendi elected not to assert for 14 years. Pet. App. at 12a-15a.

Finally, the District Court explicitly rejected Trendi's contention that the court, in its prior opinion dismissing the fourth-party action, had held that the Trendi Judgment was "null and void," stating that "the Court never questioned the validity of the Bankruptcy Court's judgment." Pet. App. at 14a. Rather, the Court explained that it "merely held that Indu Craft's indemnification claim . . . failed to state a cause of action as a matter of New York law," and that Trendi's agreement to limit recovery on the Trendi Judgment to the proceeds, if any, of Indu Craft's fourth-party indemnity claims against the Bank "would preclude Trendi from collecting on its judgment." Pet. App. at 14a. The Court concluded by stating that

"[w]hile Trendi may well have made an ill-advised agreement, which did not take adequate account of New York law regarding indemnification, that agreement was, nevertheless, the basis upon which the judgment of the Bankruptcy Court was entered," and which "has not been set aside."[7] Pet. App. at 14a.

REASONS FOR DENYING THE PETITIONS

Petitioners have not met, and cannot meet, their heavy burden of demonstrating the existence of "compelling reasons" warranting review on a writ of certiorari. Sup. Ct. R. 10. As held by this Court in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), petitions for certiorari will only be granted "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." In the words of Chief Justice Taft in *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923), certiorari jurisdiction is "not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

In support of their petitions, neither Indu Craft nor Trendi addresses, let alone challenges, the black-letter law upon which Indu Craft's common law indemnity claims were held to be legally insufficient, its RICO claims were held to be barred by *res judicata* and the four-year RICO statute of limitations, and Trendi's "Second Third Party Complaint" was held to be time-

[7] Substantially all of the arguments raised by Indu Craft and Trendi in its Petitions to this Court were made to and rejected by the Courts below. In unanimously affirming the orders of the District Court, the Court of Appeals did so by Summary Order, rather than by opinion. Nevertheless, Indu Craft and Trendi moved for rehearing and rehearing *en banc*, which was denied by Order dated July 7, 2003.

barred. Instead, Indu Craft urges that (a) the decisions below somehow violate Section 524(e) of the Bankruptcy Act, 11 U.S.C § 524(e); (b) Section 524(e) "abrogates" the common law rule requiring payment as a condition to recovery in indemnity; and (c) a "conflict" supposedly exists in the circuit courts regarding the interpretation of Section 524(e). Both Indu Craft and Trendi also claim that the decisions below constituted an impermissible "collateral attack" upon Indu Craft's reorganization plan. Finally, Trendi urges that to the extent that the courts below held that Trendi's belated "Second Third Party Complaint" did not relate back to the filing of its original third-party action, such decisions are somehow in conflict with a decision of the New York Court of Appeals.

The arguments advanced by Indu Craft and Trendi are without merit for at least the following reasons. First, (a) Section 524(e) of the Bankruptcy Code is irrelevant to any of the issues raised in the courts below; (b) there is no conflict regarding Section 524(e) and the decisions of any of the circuit courts; and (c) Section 524(e) does not abrogate or preempt the common law rules which require a loss as a condition to recovery in indemnity. Second, the determination of the courts below that Indu Craft suffered no loss, and that its claims for indemnification were legally insufficient, was not a "collateral attack" upon the Plan or any order of the Bankruptcy Court. Third, the decisions below are not in conflict with any decision of the New York Court of Appeals. Finally, and in any event, none of the arguments advanced by Indu Craft and Trendi warrants review by this Court.

I. SECTION 524(e) HAS NO APPLICATION TO THE CASE AT BAR AND THE DECISIONS BELOW DO NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY CIRCUIT COURT

Section 524(e) of the Bankruptcy Code provides that the "discharge of a debt of the debtor does not affect the liability of any other entity . . . for . . . such debt." Pet. App. at 131a. The Bank has never relied upon or otherwise claimed the benefit of Section 524(e), and has never asserted that Indu Craft's discharge in bankruptcy resulted in a discharge of Indu Craft's indemnity claims against the Bank. Rather, the Bank contends, and the courts below held, that the legal effect of Indu Craft's discharge in bankruptcy was to prevent Indu Craft from suffering any loss arising from the Trendi Judgment and that, as a result, "Indu Craft's action for indemnification cannot succeed, as a matter of law, and must be dismissed." Pet. App. at 25a.

As is clear from the legislative history of Section 524(e), the purpose of that statute was to prevent a debtor's discharge in bankruptcy from affecting the liability of a co-debtor or guarantor on the underlying debt. 4 William M. Collier *et al.*, *Collier on Bankruptcy* ¶ 524.05, n.2 (2002 ed.) *See also Terwilliger v. Terwilliger*, 206 F.3d 240, 247-48 (2d Cir. 2000). Here, the Bank is neither a "co-debtor" nor a "guarantor" of any obligation that Indu Craft may have had to Trendi, and Indu Craft's discharge in bankruptcy had no effect upon Indu Craft's burden to demonstrate the existence of a loss as a condition to asserting a valid claim for indemnity against the Bank. It is not the Bank which seeks to obtain any benefit from Section 524(e), but Indu Craft, which impermissibly seeks to use that statute in order to breathe life into a claim for indemnification that is bereft of merit.

Indu Craft's reliance upon *Green v. Welsh*, 956 F.2d 30 (2d Cir. 1992), is misplaced. *Green* and its progeny involve a narrow exception to the "fresh start" objective of the Bankruptcy Code and the discharge provisions of Section 524, which permit a creditor to proceed against a discharged debtor "solely to establish liability, as a prerequisite to recovery, permitted by state law, from an insurer or other surety." Pet. App. at 27a. This exception has nothing to do with the salient principle that "New York State law does not permit recovery on an indemnity claim where the party seeking indemnification has not suffered an out of pocket loss." Pet. App. at 27a.

For the rule in *Green* to apply, Trendi would have to sue Indu Craft in a post-discharge proceeding in order to establish Indu Craft's liability as a prerequisite to pursuing a claim against the Bank. However, the Bank in not an insurer or surety of Trendi's claims against Indu Craft, Trendi already obtained a judgment against Indu Craft and it was not Trendi, but Indu Craft, that sought to rely upon the narrow exception to Section 524(e), an exception that is intended to benefit creditors and not debtors such as Indu Craft. Simply put, Indu Craft is seeking to turn Section 524(e) on its head in order to circumvent the black letter law which prohibits any recovery in indemnity in the absence of an out-of-pocket loss.

Nor is there any "conflict" in the circuits regarding any interpretation of Section 524(e) that is applicable to the facts of this case. Indu Craft's claim of "conflict" is based upon the Third Circuit's decision in *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), a case in which the Court considered the validity of a clause in a plan of reorganization that provided for the release of third party claims, and a permanent injunction

against third party actions, against the officers and directors of the debtor. The Court held that the release and injunction provisions before it were legally unsupportable. *Id.* at 214.

In reaching this conclusion, the Court reviewed the decisions of various circuit courts which had previously considered the issue of the effect of Section 524(e) upon the validity of release and injunctive provisions regarding non-debtors in a plan of reorganization. *Id.* at 212-13. However, in none of those cases did any of the courts state that any "conflict" existed among the various decisions. Rather, and as noted by the Court in *Continental*, these decisions were fact intensive, were based upon the specific language of the particular plans under review, and did not establish a "blanket rule" regarding the validity of such release and injunctive provisions.

Regardless of the decisions reached by the courts in *Continental* and related cases, such cases have no possible bearing on the petitions for certiorari before this Court. Indu Craft's plan of reorganization contained no provision for the release of any non-debtors, the Bank has never made any claim in reliance upon Section 524(e), and the courts below did not base their decision to dismiss Indu Craft's indemnity claims upon Section 524(e). Indu Craft's attempt to use Section 524(e) to cast doubt upon the validity of the decisions below is a classic bootstrap argument that seeks to create an issue where none exists, and certainly does not demonstrate the existence of any "conflict" or compelling issue sufficient to warrant review by this Court.

II. SECTION 524(e) DOES NOT PREEMPT STATE LAW AS TO THE REQUIREMENTS FOR COMMON LAW INDEMNIFICATION

In support of its petition for a writ of certiorari, Indu Craft urges for the first time that the common law requirements for a claim of indemnification have been preempted by Section 524(e) of the Bankruptcy Code. (Indu Craft Br. at 17-18) However, Indu Craft never raised this argument in any of the courts below, and neither the District Court nor the Court of Appeals ever passed on this issue. Indu Craft is precluded from raising this issue before this Court.

It is axiomatic that the Supreme Court does not ordinarily decide questions that have not been raised or resolved by the lower courts. *Lawn v. United States*, 355 U.S. 339, 362-263, n.16 (1958); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). As stated by the Court in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992), this is one of the principles that "help to maintain the integrity of the process of certiorari." Accordingly, Indu Craft's claim of preemption should not be considered as part of its petition for a writ of certiorari.[8]

Separate and apart from the foregoing, the contention that Section 524(e) has abrogated or preempted the common law rule that requires payment as a condition to a claim for indemnification is meritless. As acknowledged by Indu Craft, Section 524(e) contains no language of preemption, and there is nothing in Section 524(e) that would remotely indicate any

[8] Indu Craft's contention that the Bank lacks "standing" to raise any argument based upon the legal effect of Indu Craft's discharge in bankruptcy is another argument that was never raised below and should not be considered by the Court. (Indu Craft Br. at 24)

intent on the part of Congress to preempt any aspect of the state law of indemnification. Simply stated, neither the fresh start objective of the Bankruptcy Code, nor the provisions of Section 524(e), have any possible bearing on the settled principal that a party seeking indemnity cannot recover in the absence of proof that it has suffered a loss. Pet. App. at 24a-27a.

Consideration of whether a federal law pre-empts state law, "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, "'[t]he purpose of Congress is the ultimate touchstone'" of pre-emption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). In the absence of express preemption, there can by no preemption of state law unless "that [state] law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" [citations omitted] *Id.*

Any contention that Section 524(e) preempts the payment rule of state indemnity law is not supported by the language, structure, or purpose of the Bankruptcy Code. The common law payment rule as applied to indemnity claims has nothing to do with the limited objective of Section 524(e) of preserving the liability of non-debtors who are jointly liable for the obligation of a debtor that is discharged in bankruptcy. Conversely, there is nothing in either the statutory language of

Section 524(e), or its legislative history, that would evidence any possible legislative concern regarding any common law claims of indemnity. *See, e.g., Brown v. Northeast Nuclear Energy Co.*, 48 F. Supp.2d 116, 120 (D. Conn. 1999) (no preemption of common law claims for breach of contract and tort, by field of federal nuclear safety legislation, where state law claims were "not motivated by an objective of regulating nuclear safety.")

Finally, the requirement of payment as a condition to a claim for indemnification does not create any conflict with the purpose of Section 524(e). It is not the fact of Indu Craft's discharge in bankruptcy, but the legal consequences of that discharge on Indu Craft's claims for indemnification that rendered such claims legally insufficient. That result has nothing whatsoever to do with Section 524(e).

III. THE DECISIONS OF THE COURTS BELOW DO NOT CONSTITUTE A "COLLATERAL ATTACK" UPON ANY ORDER OF THE BANKRUPTCY COURT

Contrary to the assertions of Indu Craft and Trendi, the determination of the courts below that Indu Craft's discharge and release in bankruptcy constituted a legal bar to Indu Craft's claims for indemnification is not a "collateral attack" upon any order of the bankruptcy court, let alone a "nullification" of Indu Craft's reorganization Plan. (Indu Craft Br. at 22-23, Trendi Br. at 11-14) At no time did the Bank ever challenge or seek to set aside the validity of any aspect of the Plan, and the decisions below contain no finding that any aspect of the Plan was invalid. Indeed, the same argument was rejected by the courts below, with the District Court explaining that in dismissing Indu Craft's fourth-party action, the Court "never

questioned the validity of the Bankruptcy Court's judgment," but "merely held that Indu Craft's indemnification claim . . . failed to state a cause of action as a matter of New York law." Pet. App. at 14a.

This Court's decision in *Celotex Corporation v. Edwards*, 514 U.S. 300 (1995), underscores the fact that the Bank's defense to the indemnification claims asserted by Indu Craft did not constitute a "collateral attack" upon any order of the Bankruptcy Court. In *Celotex*, this Court reversed a decision of the United States Court of Appeals for the Fifth Circuit, which held that respondents were entitled to execute upon a supersedeas bond posted to secure a final judgment, despite the fact that the bankruptcy court had issued an injunction prohibiting any execution on the bond without further court order. Granting certiorari to resolve a conflict between the circuit courts, this Court held that by obtaining an injunction in the Texas district court, respondents had engaged in an impermissible collateral attack upon the injunction issued by the bankruptcy court, from which no appeal had been taken. 514 U.S. at 313.

Here, it is Indu Craft and Trendi which seek to "collaterally attack" their own plan of reorganization by engaging in inventive interpretations which fly in the face of the plain language of the Plan. Thus, Indu Craft continues to argue that Trendi's claim against Indu Craft was never discharged, despite the express language of the Section 9.1 of the Plan that upon the effective date thereof, "the Debtor **shall be discharged** . . . from all Claims against and Interests in the Debtor that arose prior to the Effective Date . . . ," and Section 5.2 of the Plan, which provides that "Allowed Claims in Classes 4 and 5 are impaired and shall receive the following treatment under the Plan **in full settlement, release and discharge thereof**." (Emphasis added) Pet. App. at 77a, 64a. Similarly, Indu Craft's assertion that the

holdings of the courts below somehow impair the "feasibility" of the Plan is contrary to law, and is equally belied by its admission in its Disclosure Statement that the Plan was "feasible" and in the best interests of all of its creditors.[9] Resp. App. at 18a.

Indu Craft's contention also rests upon a fundamental misconception regarding the treatment of a claim in bankruptcy. Pursuant to § 1141(d)(1)(A) of the Bankruptcy Code, the confirmation of a debtor's Chapter 11 plan of reorganization "discharges the debtor from any debt that arose before the date of such confirmation. . . ." *In re Chateaugay Corp.*, 115 B.R. 760, 773 (Bankr. S.D.N.Y. 1990). Consistent with the foregoing, the effect of confirmation of a plan of reorganization is to extinguish all allowed or allowable claims, which are exchanged for the right to participate in and receive any benefits of that plan. *In re Friedberg*, 192 B.R. 338, 341 (Bankr. S.D.N.Y. 1996). As explained by the court in *In re Cole*, 189 B.R. 40, 45 (Bankr. S.D.N.Y. 1996), "the creditor's underlying claim is extinguished by confirmation of the plan with the debtor's obligation to comply with the terms of the confirmed plan being substituted for the underlying claim."

By voting in favor of the Plan, Trendi agreed to limit any recovery on the Trendi Judgment to its pro rata share of the

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[9] A finding that a plan of reorganization is feasible is not a guarantee of success. *In re Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986). Rather, the "key element of feasibility is whether there exists the reasonable probability that the provisions of the Plan can be performed." *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 762 (Bankr. S.D.N.Y. 1992); *see also In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985) (quoting *In re Bergman*, 585 F.2d 1171, 1179 (2d Cir. 1978)). As explained by the Court in *In re Drexel Burnham Lambert Group*, "speculative prospects of failure cannot defeat feasibility . . . since a guarantee of the future is not required." 138 B.R. at 762.

proceeds, if any, of any judgment obtained by Indu Craft on its fourth-party claims for indemnification against the Bank. Pet. App. at 14a, 102a-104a. However, because Trendi's claim against Indu Craft was settled, released and discharged, Indu Craft has not suffered, and cannot possibly suffer, any loss for which a claim for indemnity would lie. Having drafted the Plan and the discharge and release provisions contained therein, it is simply too late for Indu Craft, with the aide of Trendi, its sister company, now to attempt to rewrite those provisions in a manner more to its liking.[10]

IV. THE DECISIONS OF THE COURTS BELOW DO NOT CONFLICT WITH ANY DECISION OF THE NEW YORK COURT OF APPEALS

Seeking to create a conflict where none exists, Trendi urges that the decisions below dismissing its "Second Third Party Complaint" somehow conflict with the decision of the New York Court of Appeals in *Duffy v. Horton Memorial Hospital*, 66 N.Y.2d 473, 497 N.Y.S.2d 890 (1985). In *Duffy*, the New York Court of Appeals held that an amended complaint against a third-party defendant, with actual notice of plaintiff's potential claims, would relate back to the time of the filing of the original complaint. As stated by the Court, where "a potential defendant is fully aware that a claim is being made against him with respect to the transaction or occurrence involved in the suit, . . . permitting an amendment to relate back would not necessarily be at odds with the policies underlying the Statute of Limitations." 66 N.Y.2d at 477, 497 N.Y.S.2d at 893.

[10] Pursuant to Section 1144 of the Bankruptcy Code, a party seeking to revoke an order of confirmation must do so within "180 days after the date of the entry of the order of confirmation." Here, the Plan was confirmed by Order of the Bankruptcy Court dated March 29, 1999. Pet. App. at 90a-101a.

The facts in *Duffy* are not remotely similar to facts of this case and serve only to underscore the correctness of the decisions below dismissing Trendi's belated pleading in its entirety. Unlike the plaintiff in *Duffy*, Trendi never sought to amend its pleading, but simply asserted direct claims against the Bank, purportedly as a matter of right, long after its third-party claims had been fully adjudicated and merged into a final judgment, and long after the expiration of all applicable statutes of limitation. Unlike the third-party defendant in *Duffy*, the Bank had no notice that it would be subjected to claims by Trendi that arose some **15 years** earlier, and which Trendi deliberately failed to assert despite having had every opportunity to do so.

The decision in *Duffy* is not only fact-intensive, but involves facts that are far different from those presented in the instant case. To the extent that petitioners seek to alter or challenge factual determinations reached by the courts below, such matters are not properly within the scope of review by this Court.[11] In the absence of extraordinary circumstances, it is the "settled practice" of this Court to accept "factual determinations in which the district court and the court of appeals have concurred." *Branti v. Finkel*, 445 U.S. 507, 512 (1980); *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 501 (1951).

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[11] Without the benefit of citation to the record, Trendi asserts that the Bank "had 'actual notice' of Trendi's claims when [the Bank] was impleaded in 1990." (Trendi Br. at 24) The record facts are otherwise. Until July 30, 2001, when Trendi filed its "Second Third Party Complaint" seeking for the first time to assert direct claims against the Bank, the only claims ever asserted by Trendi were the third-party claims that it asserted against its sister company, Indu Craft. Pet. App. at 2a-5a, 10a. Trendi made the same argument in the courts below, and although such courts did not specifically rule on Trendi's false claim of "notice," such claim was implicitly rejected by the refusal to allow Trendi's self-styled pleading to relate back to May, 1990, the time of its original third-party claims against Indu Craft.

Finally, the standard of review of a determination not to permit a new or amended pleading to relate back to the date of the original pleading is an abuse of discretion. *Wilson v. Fairchild Republic Co.*, 143 F.3d 733, 738 (2d Cir. 1998); *See also Tho Dinh Tran v. The Alphonse Hotel Corp.*, 281 F.3d 23, 26-27 (2d Cir. 2002). Whether or not the decisions below regarding the relation back of Trendi's "Second Third Party Complaint" constituted an abuse of discretion is not a matter that is subject to review by this Court. *Cheang-Kee v. U.S.*, 70 U.S. 320, 326 (1865). Accordingly, no further review of the determinations of the courts below dismissing Trendi's belated and untimely pleading is warranted.

V. PETITIONERS' REMAINING ARGUMENTS ARE WITHOUT MERIT

Virtually every argument advanced by petitioners rests upon a false or misleading premise, or is otherwise based upon a misinterpretation of facts that is beyond the proper scope of review by this Court. For example, petitioners' entire argument regarding Section 524(e) of the Bankruptcy Code is based upon the erroneous notion that the decisions below "effectively granted a non-debtor discharge" to the Bank in violation of Section 524(e). (Indu Craft Br. at 8) Petitioners' mischaracterization of the decisions of the courts below falls far short of the heavy burden they are required to meet in order to demonstrate the existence of a compelling reason sufficient to warrant review by this Court.

Similarly, Trendi's contention that the decisions below create a compelling issue regarding the statute of limitations applicable to its "Second Third Party Complaint" is plainly erroneous. Far from creating "three different statutes of limitation for the same claim," the decisions below applied

settled and incontrovertible legal principles to dismiss a pleading which Trendi had no standing to file, and which was plainly time-barred under the most generous of limitation periods. (Trendi Br. at 25) Trendi's misunderstanding of these principles provides no basis for review by this Court.[12]

As stated by the District Court, pursuant to Fed. R. Civ. P. 14(a), Trendi was "fully advised" of Indu Craft's claims against the Bank and, as a defendant and third-party plaintiff in the 1989 Action, could have filed a direct claim against the Bank at any time between the filing by Indu Craft of its fourth party action on June 21, 1990 and the entry of Final Judgment by the Bankruptcy Court on January 18, 2000. Pet. App. at 14a-15a. However, Trendi was required to do so "before the statute of limitations has run." Pet. App. at 12a. For reasons that "remain[] unexplained," Trendi, simply failed to do so. Pet. App. at 15a.

Trendi's reliance upon the cases cited at page 26 of its brief is equally misplaced. Unlike the facts found by the courts below, these cases involved situations in which third-party defendants

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[12] By its terms, Rule 14 only applies to parties to a pending action, and "only defending parties may implead." 3 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 14.03[2] (3d ed. 2003) Thus, only a "defending party" may commence a third-party action, only a "third-party defendant" may assert claims against the plaintiff or any person who is not a party "who is or may be liable to the third-party defendant" for the claims asserted against him, and only a "plaintiff" may assert claims directly against the third-party defendant. Fed R. Civ. P. 14(a). Once the third-party action was terminated by the entry of judgment in favor of Trendi, Trendi was no longer a "party," let alone a "defending party," to the third-party action, and lacked standing to assert any third-party claims against the Bank. *Retcal, Inc. v. Insular Lumber Co. (Phil.), Inc.*, 379 F. Supp. 62, 64 (C.D. Cal. 1973) (persons who were neither defendants, defending parties, nor claimants were not authorized to file third-party action under Rule 14).

had actual notice that the plaintiffs were proceeding directly against them, and actually defended against plaintiffs' claims without objection, despite the fact that no formal claim had ever been asserted by plaintiffs directly against such third-party defendants.[13] Again, Trendi's reliance upon these cases rests upon its unilateral and unsupported assertion that the Bank was "effectively on notice" of Trendi's claims, an assertion that was made and implicitly rejected by the courts below.

Finally, and without the benefit of any authority, Indu Craft urges that this Court should exercise its "supervisory powers" in order to give effect to the Trendi Judgment, despite the plain language of the Plan which discharges Indu Craft from any liability on Trendi's underlying claim except to the limited extent provided for in the Modified Plan. (Indu Craft Br. at 25-27) In making this argument, Indu Craft erroneously asserts that the decisions below were fundamentally inconsistent in that they purportedly held that the Trendi Judgment, although not void, was not required to be paid by Indu Craft. (Indu Craft Br. at 25) Once again, Indu Craft's baseless attack upon the decisions of the courts below provides no conceivable basis for review by this Court.

Contrary to petitioners' rhetorical assertions, the decisions below are neither inconsistent, contradictory, conflicting, illogical, unfair or, in the words of Trendi, "schizophrenic." (Indu Craft Br. at 25-26, Trendi Br. at 22) Rather, such decisions rest upon the fundamental and irrefutable rule that a party may not recover in indemnity in the absence of a loss. As held by the courts below, and as a result of Indu Craft's discharge in bankruptcy, Indu Craft had not suffered, and could not suffer, any loss for which a claim for indemnity would lie.

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[13] *See Project Hope v. M/V IBN SINA*, 250 F.3d 67 (2d Cir. 2001), and *Wasik v. Borg*, 423 F.2d 44 (2d Cir. 1970).

Simply put, the indemnity claims asserted by Indu Craft in its fourth-party action, and the direct claims belatedly asserted by Trendi in its "Second Third Party Complaint," are a sham. If Trendi and Indu Craft were truly at arms-length, it is inconceivable that Indu Craft, having received a full discharge and release in bankruptcy, would invest the time, effort and expense to pursue a claim for indemnity with respect to a collusive judgment which it cannot pay, has no obligation to pay, and as to which it has not suffered, and will never suffer, any loss. The decisions of the courts below were correct, petitioners have failed to demonstrate any basis for review by this Court, and the time has come to bring this Dickensian litigation to an end.

CONCLUSION

For each of the foregoing reasons, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM DISCLOSURE STATEMENT FOR SECOND AMENDED PLAN OF REORGANIZATION OF INDU CRAFT, INC. DATED NOVEMBER 9, 1998

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11

Case No. 97 B 44958 (JHG)

In re

INDU CRAFT, INC. Taxpayer I.D. No. 13-3048561,

Debtor.

DISCLOSURE STATEMENT FOR SECOND AMENDED PLAN OF REORGANIZATION OF INDU CRAFT, INC.

Dated: New York, New York
November 9, 1998

SUMMARY

The debtor, Indu Craft, Inc. (the "Debtor") has filed its *Second Amended Plan of Reorganization of Indu Craft, Inc.*, dated November 9, 1998 (the "Plan"), with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). This *Disclosure Statement for Second Amended Plan of Reorganization of Indu Craft, Inc.* (the "Disclosure Statement") has received the approval of the Bankruptcy Court for use in connection with the

solicitation of acceptances of the Plan from holders of Claims against and Interests in the Debtor pursuant to section 1125 of title 11 of the United States Code (the "Bankruptcy Code").

A glossary of terms frequently used in this Disclosure Statement is set forth in Article 1 of the Plan.

In the Debtor's opinion, the treatment of Claims and Interests under the Plan provides a greater recovery than that which is likely to be achieved under other alternatives for the reorganization or liquidation of the Debtor.

Accordingly, the Debtor believes that Confirmation of the Plan is in the best interests of Creditors and Interest Holders and recommends that you vote to accept the Plan.

The Debtor

The Debtor is a corporation organized and existing under the laws of the State of New York having an address at P.O. Box 316, New York, New York 10018-0136. The Debtor's President and sole director is Hemant Mehta ("Mehta"). The Debtor's sole shareholder is Tze Wung Consultants, Ltd. ("Tze Wung"), a Hong Kong corporation maintaining offices for the conduct of business at Manulife Towers, 7th Floor, 169 Electric Road, Hong Kong.

The Debtor had been in the business of importing ladies' sportswear for sale at retail and wholesale. As set forth in more detail below, the Debtor's business was destroyed by the bad faith refusal of the Debtor's lender, Bank of Baroda, to continue extending credit to the Debtor on commercially

reasonable terms after the Debtor refused to invest in a business venture belonging to the son of an officer of Bank of Baroda.

Bank of Baroda's bad faith actions resulted in the closure of the Debtor's business and ultimately resulted in the issuance of a judgment against Bank of Baroda in the Debtor's favor in the amount of $2,519,822.29 on July 31, 1996.

* * *

Accordingly, to protect the interests of its Creditors and Interest Holders, the Debtor filed its voluntary petition commencing this case under chapter 11 of the Bankruptcy Code on July 25, 1997.

The Plan

The Plan provides for the payment in-full of all administrative, priority tax and secured claims and holders of Allowed Claims in Class 3 and 4 from the Interpleader Proceeds. Additionally, the Plan provides for the contribution by Tze Wung of up to $200,000 to enable the Debtor to fund post-confirmation claims of the Debtor, the proceeds of which will be used to pay holders of Allowed Claims in Class 5 (Subordinated Claims). The Plan categorizes the Claims against and Interests in the Debtor into various classes. The Plan also provides that the reasonable fees and expenses incurred by the Debtor during the Case will be paid in full and specifies the manner in which each class of Claims and Interests is to be treated.

Appendix

The Debtor's sole Interest Holder, Tze Wung, will retain its interests in the Debtor in exchange for the New Capital Contribution.

The table below provides a summary of the classification and treatment of Claims and Interests under the Plan. The figures set forth in the table below represent the Debtor's best estimate of the total amount of Allowed Claims and Allowed Interests in the Case. These estimates have been developed by the Debtor based on an analysis of its books and records and the proofs of claim filed in the case. The Bankruptcy Court set September 8, 1997, as the last date for filing Proofs of Claims and Proofs of Interests filed with the Bankruptcy Court by Creditors and Interest Holders. See "SIGNIFICANT EVENTS IN THE CASE — Bar Date." There can be no assurance that the amount of Claims and Interests that may be filed and allowed by the Bankruptcy Court will not exceed the amounts set forth below:

Class and Estimated Amount	**Type of Claim or Equity Interest**	**Summary of Treatment**
$140,000.00	Administrative Claims (including Claims for Professional Compensation and Reimbursement, Post-petition Ordinary Course Liabilities and	**Unimpaired.** Each Administrative Claim, to the extent not previously paid, shall be paid by the Disbursing Agent, in Cash, in full on (i) the later of the Effective Date, the date payment of such Claim is due under the terms thereof or applicable law, or three

Appendix

Class and Estimated Amount	Type of Claim or Equity Interest	Summary of Treatment
	Post-petition Tax Claims)	business days after such Claim becomes an Administrative Claim or (ii) as may be otherwise mutually agreed in writing between the Disbursing Agent and the holder of such Claim; *provided, however*, that any Administrative Claim incurred by the Debtor in the ordinary course of its business shall be paid in full or performed by the Debtor in accordance with the terms and conditions of the particular transaction giving rise to such Administrative Claim and any agreements relating thereto.
152,385.00[1]	Priority Claims and Priority Tax Claims	**Unimpaired.** Subject to the provisions of Article 8 of the Plan, all Allowed Claims of

1. This number is comprised of: (i) NYC's Claim, in the amount of $12,385.00; (ii) NYS' Claim, in the amount of $15,000.00 and Vinod Gaglani's Claim, in the amount of $125,000.00. The Debtor has filed a motion seeking to expunge Vinod Gaglani's Claim. To the extent that Vinod Gaglani has a claim in excess of $15,000.00, the amount of his claim above $15,000.00 will be treated in Class 5.

Appendix

Class and Estimated Amount	Type of Claim or Equity Interest	Summary of Treatment
		Governmental Units entitled to priority pursuant to section 507(a)(8) of the Bankruptcy Code, and other holders of Allowed priority claims shall be paid, in Cash, in full on the Effective Date.
Class 1 $635,000	EVW Secured Claim	**Unimpaired.** In full satisfaction of the EVW Secured Claim against the Debtor, if any, EVW shall receive the treatment accorded to it under the Stipulation and Consent Order Resolving Claims of Eaton & VanWinkle and Providing Relief from the Automatic Stay, a copy of which is annexed to the Plan as Exhibit "A" and the terms of which are incorporated by reference therein.
Class 2 $112,300.31[2]	IRS Interest Claim	**Unimpaired.** Subject to the provisions of Article 8 of the

2. In its amended proof of claim (Claim # 16), IRS asserts a claim for interest and interest on interest in the amount of $112,300.31. This claim is the subject of a motion objecting to such claim. The motion is returnable on December 10, 1998.

Appendix

Class and Estimated Amount	Type of Claim or Equity Interest	Summary of Treatment
		Plan with respect to Disputed Claims, in full satisfaction of the IRS Interest Claim against the Debtor, if any, the IRS shall receive payment in cash, in the amount of one hundred percent (100%) of its Allowed Interest Claim.
Class 3 $ 11,056.75	Unsecured Claims	**Unimpaired.** Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, as soon as practicable following the resolution and payment of Administrative Claims. Priority Claims, and Trustee Fees, if any, each holder of an Unsecured Claim shall be paid, in cash, in full on the Effective Date.
Class 4 $620,000.00[3]	Tze Wung Secured Claim	**Impaired.** Subject to the provisions of Article 8 of the Plan with respect to Disputed

3. Tze Wung had filed a claim, in the amount of $1,820,000.00. However, by order of the bankruptcy court dated June 22 (the "June 22 Order") this Court authorized the Debtor to remit the sum of $1,200,000.00 to Tze Wung, thus reducing its claim to $620,000.00.

Appendix

Class and Estimated Amount	Type of Claim or Equity Interest	Summary of Treatment
		Claims, on the Effective Date and as soon as practicable following the resolution and payment to holders of Allowed Administrative Claims, Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2 and 3, and Trustee Fees; the holder of an Allowed Claim in Class 4 shall receive its Pro Rata Distribution of all available Distributable Cash (after taking into account payments made on account of Allowed Administrative Claims, Allowed Priority Tax Claims, and holders of Allowed Claims inClasses 2 and 3).
Class 5 Unknown	Subordinated Claims	**Impaired.** Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, as soon as practicable following the resolution and payment of holders of Allowed Administrative Claims,

Appendix

Class and Estimated Amount	Type of Claim or Equity Interest	Summary of Treatment
		holders of Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2, 3 and 4, and United States Trustee Fees, holders of Allowed Claims in Class 5 shall receive; (i) their Pro Rata distribution of all available Distributable Cash (after taking into account payments made on account of Allowed Administrative Claims, Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2, 3 and 4 and United States Trustee Fees, if any), and (ii) their pro rata distribution of the net proceeds of any recovery in Baroda II after deduction for the appropriate legal fees, costs and disbursements.
Class 6 Not Applicable	Allowed Interests	**Impaired.** On the Effective Date, each Interest Holder shall retain its respective Allowed Interest in the Debtor in return for the New Capital Contribution.

* * *

Appendix

EVENTS LEADING TO CHAPTER 11

In 1987, Bank of Baroda,[4] commenced a campaign-that effectively drove the Debtor out of business and ultimately resulted in a judgment being awarded to the Debtor in the approximate amount of $2.5 million. As detailed below, the actions taken by Bank of Baroda, and the litigation commenced in response thereto, have spun off in their wake additional claims and litigation involving a variety of parties which have continued for nearly ten years. A brief summary of some of the more important claims, parties and litigation is set forth below.

Bank of Baroda I.[5] The Debtor was formerly engaged in the business of importing ladies' sportswear from the Far East and selling those goods in the United States. The business involved placing orders for garments with foreign suppliers and promptly arranging for the issuance of letters of credit in their favor. The letter of credit guaranteed the foreign supplier that it would be paid when the garments

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4. Bank of Baroda is a foreign bank organized and existing under the laws of India and owned by the Government of India, with its principal place of business in Mumbai, formerly known as Bombay, India. Bank of Baroda is authorized to do business in the State of New York and maintains a branch office at One Park Avenue, New York, New York.

5. The following discussion of the Debtor's relationship with Bank of Baroda, which relationship led to the demise of the Debtor's business and the award of $2.6 million in the Debtor's favor, is based upon, and closely follows, the opinion of the United States Court of Appeals for the Second Circuit, issued February 3, 1995, and reported as *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490 (2d Cir. 1995).

were shipped. In those foreign countries where the Debtor's suppliers were located, letters of credit were needed by manufacturers to ensure compliance with quota restrictions on exports. Normally, suppliers will not ship — and sometimes will not even begin to manufacture — garments until they receive a letter of credit. Because the garment industry is, by its very nature, seasonal, delay is very detrimental in selling a line of clothes. Due to this time factor, a delay in the issuance of a letter of credit inevitably results in a slowdown of production or a holding up of the shipment of merchandise, causing a concomitant loss of business.

Contrary to industry practice, the Debtor's suppliers often began production of garments relying on their good relationships with the Debtor and the Debtor's assurance that letters of credit would be speedily forthcoming. Swift delivery was a critical element in the Debtor's . . .

* * *

As a result of the foregoing events, the Debtor ceased operations in November 1987.

In October 1987, the Debtor commenced a civil action against Bank of Baroda and Chokshi in the United States District Court for the Southern District of New York (the "Baroda Action"). Among other things, the Debtor's complaint alleged that Bank of Baroda had breached its covenant of good faith and fair dealing implied in the revolving credit agreement; and that Bank of Baroda and Chokshi committed a prima facie tort. Bank of Baroda counterclaimed for approximately $1.7 million under its line of credit loan.

Appendix

A four day trial was scheduled to commence before District Judge Duffy on September 30, 1991. However, in late September 1991, Judge Duffy notified the Debtor and Bank of Baroda that he could not proceed as scheduled and the trial was adjourned indefinitely. The parties then consented to trial before United States Magistrate Judge Leonard A. Bernikow and a twenty-three day jury trial was held before Judge Bernikow in July and August 1992.

On August 21, 1992, the jury found that Bank of Baroda's actions were not taken in good faith but grew out of Mehta's refusal to invest in the computer business for Anil Chokshi and thus violated the covenant of good faith and fair dealing implied in the loan documents. The jury also found that Bank of Baroda and Chokshi acted with malice to injure the Debtor and that such action constituted a prima facie tort. The jury found that the Debtor had been damaged in the amount of $3 million on its contract claim, but that the Debtor had failed to mitigate $1 million of this amount. Additionally, the jury awarded the Debtor $1.25 million on its prima facie tort claim. Prior to being discharged, the jury was polled and stated it was their intention that the cumulative award to the Debtor be $3.25 million. On Bank of Baroda's counterclaim for the $1.7 million due under the line of credit, the jury concluded that Bank of Baroda had wrongfully interfered and prevented the Debtor from repaying the loan and thereby denied Bank of Baroda any recovery.

Judge Bernikow entered judgment on August 24, 1992. On September 1, 1992, Bank of Baroda filed a motion pursuant to Rule 50 of the Federal Rules of Civil Procedure seeking judgment notwithstanding the verdict or, alter-

natively, for a new trial contending that all the jury verdicts should be overturned as a matter of law.

In ruling on Bank of Baroda's motion, Judge Bernikow found that although the Debtor had proven the loss of value of its business as a going concern, it had failed to produce proof of its variable expenses and fixed costs. Thus, he concluded the Debtor had failed to prove lost profits, requiring a judgment dismissing the jury's contract damages award. He also vacated the prima facie tort award on the grounds that it was duplicative of the contract damages award. Finally, he upheld the jury's verdict on Bank of Baroda's counterclaim, observing that the Bank of Baroda's bad faith actions wrongfully prevented the Debtor from repaying the note. Accordingly, on or about December 17, 1993, Judge Bernikow dismissed all claims and counterclaims.

* * *

The Interpleader Action. On or about June 14, 1996, Bank of Baroda commenced a civil interpleader action in the United States District Court for the Southern District of New York, by filing an *Interpleader Complaint* alleging that it was required to pay the sum of $2,566,557.35 to the Debtor pursuant to the final judgment issued in the Baroda Action, and that various parties have made, or were reasonably expected to make claims against all or a portion of the proceeds of the judgment. *Bank of Baroda, Plaintiff, -against- Indu Craft, Inc., Eaton & Van Winkle, Bank of India, Hershman & Leicher, P.C., Internal Revenue Service, Department of the Treasury, New York State Department of Taxation and Finance, New York City Department* of *Finance, "John Doe and Jane Doe A through Z," said names being*

fictitious and unknown to Plaintiff, the persons or parties intended to be those individuals or entities who may claim an interest in the property interpleaded herein, Defendants, Case No. 96 C.V., 4420 (S.D.N.Y.) (the "Interpleader Action"). In connection therewith, on or about June 17, 1996, Bank of Baroda deposited $2,576,891.82 (representing the judgment rendered in the Baroda Action, together with interest thereon) into an interest bearing account maintained by the Clerk of the District Court (the "Interpleader Proceeds").

In the Interpleader Action, Bank of Baroda alleged that without a determination of the Court it was unable to pay the proceeds of the judgment without danger of exposing itself to multiple liability to those parties that had made, or could make, claims against such funds. Accordingly, Bank of Baroda, asserting itself to be a disinterested stakeholder, asked the Court to enter judgment determining the rights and priorities of the various claimants to the judgment proceeds and discharging Bank of Baroda from its liabilities with respect thereto. Bank of Baroda named as defendants in the Interpleader Action, (i) EVW, Bank of India, (ii) Hershman & Leicher, a law firm holding an alleged claim for attorneys' fees in the sum of $24,373, (iii) the IRS, holding . . .

* * *

Decision to Commence this Case

The proximate cause of the decision to seek chapter 11 relief was the Debtor's inability to consummate a settlement with the IRS. As indicated above, The Debtor believes that its 1985 tax obligation should have been abated by carrying back the 1986 and 1987 losses against the 1985 taxable gain

pursuant to section 6511 of the Internal Revenue Code. Accordingly, the Debtor believes that the maximum amount due to the IRS will not exceed $75,000.00. While the Debtor and the IRS have attempted to negotiate a resolution of this issue, the IRS insisted that the Debtor must first pay the approximate $1,100,000 claim and then apply for a refund. The Debtor believed that this process could take as much as two years, whereas it believed that in the course of a case under chapter 11, the amount of the IRS claim can be determined and the abatement amounts offset without the need to undergo a lengthy refund procedure. Accordingly, the Debtor believes that it can generate a greater and more immediate recovery for all of its creditors within the structured environment of chapter 11.

Additionally, Tze Wung has committed to contributing up to $200,000 to fund post-Effective Date Claims of the Debtor, including but not limited to Baroda II, the recoveries of which will fund the payment to holders of claims in Class 5. Tze Wung is only willing to make this contribution in the context of a confirmed chapter 11 plan of reorganization that puts to rest the Debtor's many difficulties of the last ten years. These sums would be available to the Debtor to prosecute its claims against Bank of Baroda in Baroda II.

Accordingly, to protect the interests of all of its Creditors and Interest Holders, the Debtor filed its voluntary petition commencing this case under chapter 11 of the Bankruptcy Code on the Petition Date.

* * *

Appendix

Treatment of Claims and Interests Classified Under the Plan

Articles 4 and 5 of the Plan provide for the treatment of impaired and unimpaired Claims and Interests classified in Article 3 of the Plan as follows:

Class I - EVW Secured Claim. In full satisfaction of the EVW Secured Claim against the Debtor, if any, EVW shall receive the treatment accorded to it under the Stipulation and Consent Order Resolving Claims of Eaton & VanWinkle and Providing Relief from the Automatic Stay, a copy of which is annexed to the Plan as Exhibit "A" and the terms of which are incorporated by reference therein.

Class 2 - IRS Interest Claim. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, in full satisfaction of the IRS Interest Claim against the Debtor, if any, upon resolution of the Adversary Proceeding, the IRS shall receive payment in cash, in the amount of one hundred percent (100%) of its Allowed Claim.

Class 3 - Unsecured Claims. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, as soon as practicable following the resolution and payment of Administrative Claims, Priority Claims, and Trustee Fees, if any, each holder of an Unsecured Claim shall be paid, in cash, in full on the Effective Date.

Class 4 - Tze Wung Secured Claim. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, on the Effective Date, as soon as practicable follow-

ing the resolution and payment to holders of Allowed Administrative Claims, Allowed Priority Tax Claims, holders of Allowed Claims in Class 2 and 3, and Trustee Fees; the holder of an Allowed Claim in Class 4 shall receive its Pro Rata Distribution of all available Distributable Cash (after taking into account payments made on account of Allowed Administrative Claims, Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2 and 3) and Trustee Fees.

Class 5 - Subordinated Claims. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, as soon as practicable following the resolution and payment of holders of Allowed Administrative Claims, holders of Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2, 3 and 4, and United States Trustee Fees; holders of Allowed Claims in Class 5 shall receive; (i) their Pro Rata distribution of all available Distributable Cash (after taking into account payments made on account of Allowed Administrative Claims, Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2, 3 and 4 and United States Trustee Fees, if any), and (ii) their pro rata distribution of the net proceeds of any recovery in Baroda II after deduction for the appropriate legal fees, costs, and disbursements.

* * *

RISK FACTORS

Although the Debtor believes that it will be able to meet all of the obligations that it is undertaking pursuant to the Plan there can be no assurance that future events will not cause the Debtor to default on one or more of its obligations

under the Plan. The following factors (and other risks considered elsewhere in this Disclosure Statement) should be considered by each Creditor, Interest Holder and their respective advisers.

There can be no assurance that the tax claims of the IRS and the City and the State of New York can be resolved and reduced to the amounts that the Debtor believes is appropriate as set forth above. There can be no assurance that the Debtor will recommence the litigation in Baroda II, or that such litigation, if commenced would be resolved in the Debtor's favor.

Further, there can be no assurance that the Debtor's business, which will be recommenced following the Debtor's receipt of the New Capital Contribution, will be successful.

* * *

Feasibility. For the Plan to be confirmed, it must be demonstrated that consummation of the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Debtor. For purposes of determining whether the Plan meets this requirement, the Debtor has analyzed its ability to meet its obligations under the Plan. Inasmuch as the Plan provides for the distribution to holders of Allowed Administrative Claims, Allowed Priority and Priority Tax Claims and holders of Allowed Claims in Class 3 from the Interpleader Proceeds, the Debtor believes that it will be able to make all payments required to be made pursuant to the Plan.

* * *

Appendix

EFFECT OF CONFIRMATION

On the Effective Date, the Debtor will be discharged from all Claims and Interests which existed prior to confirmation of the Plan, except for payments and distributions provided for in the Plan or in the order of the Bankruptcy Court confirming the Plan. The Debtor's discharge will be fully effective against all Creditors and Interest holders, regardless of whether they have voted to accept or reject the Plan and regardless of whether the Plan is confirmed by consent or by resort to the provisions of section 1129(b) of the Bankruptcy Code.

Discharge of Debtor

On the Effective Date the Debtor will be discharged pursuant to section 1141 of the Bankruptcy Code from all Claims against and Interests in the Debtor that arose prior to the Effective Date and from any liability of a kind specified in sections 502(g), 502(h) or 502(i) of the Bankruptcy Code whether (i) a Proof of Claim or Proof of Interest has been filed or deemed to have been filed with respect to such Claim or Interest, (ii) such Claim or Interest is allowed or disallowed, or (iii) the holder of such Claim or Interest has accepted the Plan. All Persons will be precluded and enjoined from asserting against the Debtor and its successors, assets or properties, or against any property that is distributed, or is to be distributed under the Plan, any other or further Claim or Interest based upon any acts or omission, transaction or other activity of any kind or nature that occurred prior to the Effective Date. The entry of the Confirmation Order shall forever stay, restrain and permanently enjoin (i) the

commencement or continuation of any action, the employment of process, or any act to collect, enforce, attach, recover or offset from the Debtor, or from property of the Debtor, (ii) the creation, perfection or enforcement of any lien or encumbrance against any property of the Debtor or any property distributed under the Plan, or (iii) any Claim or Interest discharged under the Confirmation Order, the Plan or pursuant to section 1141(d)(1) of the Bankruptcy Code, except as otherwise provided in the Plan, or in the Confirmation Order, or with respect to the Debtor's obligations under the Plan or Confirmation Order.

Releases

Section 1125(e) of the Bankruptcy Code, commonly referred to as the "safe harbor," protects persons acting in good faith, from civil claims arising in connection with solicitations of acceptances of plans of reorganization or participating in the offer, issuance, sale or purchase of a security under the Plan. Pursuant to section 1125(e), as set forth in Article 9 of the Plan, neither the Debtor, nor its respective officers, directors, general partner, managing agent or employees (acting in such capacity) nor any professional person employed by any of them, shall have or incur any liability to any entity for any action taken or omitted to be taken in connection with or related to the formulation, preparation, dissemination, Confirmation or consummation of the Plan, the Disclosure Statement or any contract, instrument, release or other agreement or document created or entered into, or any other action taken or omitted to be taken in connection with the Case or the Plan. From and after the Effective Date, a copy of the Confirmation Order and the

Plan shall constitute and may be submitted as a complete defense to any claim or liability released pursuant to this Article 9 of the Plan.

Further, upon the Effective Date, in consideration of the Cash and other property to be distributed to or on behalf of the holders of Claims under the Plan, the Plan shall be deemed to resolve all disputes and constitute a settlement and release, between and among the Debtor, its partners, officers, directors, agents, representatives and employees and shall constitute a release of the Released Entities, effective as of the Effective Date, by the Debtor, on its own behalf and on behalf of all Interest Holders and Creditors, and by each Creditor and Interest Holder from any claim or liability, whether legal, equitable, contractual, secured, unsecured, liquidated, unliquidated, disputed, undisputed, matured, unmatured, fixed or contingent, known or unknown, that the Debtor, its Creditors or Interest Holders ever had, now have or hereafter may have (including, without limitation, any claims the Debtor may assert on its own behalf or on behalf of Creditors or Interest Holders pursuant to sections 510 and 542 through 553 of the Bankruptcy Code, any claims Creditors or Interest Holders may have asserted derivatively on behalf of the Debtor absent bankruptcy, any claims based on the conduct of the Debtor's business affairs prior or subsequent to the commencement of the Case or any claims based on the negotiation, submission and confirmation of the Plan).

* * *

Appendix

CONCLUSION

The Debtor believes the Plan is in the best interests of all Creditors and Interest Holders and strongly encourages all holders of Claims against and Interests in the Debtor to vote to accept the Plan and to evidence such acceptance by promptly returning their Ballots to ensure that they will be received not later than 5:00 p.m., Eastern Standard Time, on _____, 1998.

Dated: New York, New York
November 9, 1998

INDU CRAFT, INC.

By: s/ Hemant Mehta
Hemant Mehta, its President

ROBINSON BROG LEINWAND GREENE
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By: s/ A. Mitchell Greene
A. Mitchell Greene (AMG-5900)

EXCERPTS FROM TRANSCRIPT OF HEARING HELD ON OCTOBER 5, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 Civ. 5996 JSM

BANK OF INDIA,

Plaintiff,

v.

TRENDI SPORTSWEAR, INC., et al.,

Defendants.

October 5, 1990
3:00 p.m.

Before:

HON. JOHN S. MARTIN
District Judge

* * *

THE COURT: Don't we really have a manufactured claim here? My right pocket is suing my left pocket, right?

MR. CHASE: It's true that the companies are related. And it may also be true that it might have been possible to assert these claims previously.

We cant speak to that because as it happens we were not counsel for Indu Craft at the time that any possible action could have been taken.

THE COURT: I think it is something I can take into consideration in exercising my discretion as to whether or not to stay this action.

* * * *

TRANSCRIPT OF BANKRUPTCY COURT HEARING HELD ON DECEMBER 22, 1998

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No.
9744958

In the Matter

of

INDU CRAFT, INC.,

Debtor.

December 22, 1998

Motion for fourth Order extending Debtor's exclusive right to file a plan and solicit acceptances.

BEFORE:

HON. JEFFRY H. GALLET,
Bankruptcy Judge

PROCEEDINGS

MR. SHAFFERMAN: Good morning, Your Honor, I'm here on a motion on the fourth extension of the Debtor's exclusive period.

We've been striving to confirm a plan. A Disclosure Statement has been approved, as I had stated in a previous

hearing. We've got — we thought we had an agreement with the Internal Revenue Service or the U.S. Attorney's Office as to their treatment, but it had to go through another branch of the government. I learned about a week or ten days ago, it still had left not left the U.S. Attorney's office, so we're going to be modifying the plan, and we filed this motion prior to my learning that information.

We're seeking a short extension —

THE COURT: Why do you need an extension? Is it that somebody is pounding on your door to file a plan?

MR. SHAFFERMAN: No, Your Honor, that's not the case, but I've learned in this case and others that anything is possible —

THE COURT: That's the reason that I'm going to deny the motion. This Debtor has had lots of chance to do it. If somebody rushes up with a plan, I'm going to let them do that.

It's unlikely in this case, but I don't think that this case, at this point, meets any of the reasons Congress contemplated for extending it.

In fact, I didn't think it did last time, but I extended it anyway.

You can only carry me beyond Congress for so many extensions denied.

MR. SHAFFERMAN: Thank you, would Your Honor want me to submit an Order?

THE COURT: Please.

MR. SHAFFERMAN: Thank you.

THE COURT: This case, by the way, has reached the end of its rope. It is very shortly going to be confirmed on the plan you have or it's going to be converted.

There are lots of things on this plan that are beginning to make me very, very nervous, the way the claims are, the insider problems. This may be a case that would well be served by either a Chapter 11 or Chapter 7 Trustee.

If it goes through or not, I think the moment may come to have someone else take a look at this arrangement as it unravels before my eyes.

MR. SHAFFERMAN: Well, Your Honor —

THE COURT: I'm not doing anything today, I'm just warning you for the next time.

MR. SHAFFERMAN: As of now I believe — I'm hopeful that but for IRS and one other creditor, we're there.

THE COURT: There are some potential loose ends in this plan, and they are loose ends that are causing you some concern.

MR. SHAFFERMAN: Thank you.

JOINT STATEMENT OF FACTS CONCERNING THE CLAIMS OF TRENDI SPORTS-WEAR, INC. AND INDU CRAFT, INC. DATED JUNE 10, 1999

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

CHAPTER 11

CASE NO. 97 B 44958 (JHG).

In re:

Indu Craft, Inc.

Debtor

Joint Statement of Facts Concerning The Claims of Trendi Sportswear, Inc. and Indu Craft, Inc. (Claim #8)

1. Indu Craft, Inc. ("Indu Craft") agreed to deliver ladies' ready-made garments ("Garments") worth $7,217,115.50 between June and September of 1987 to Trendi Sportswear, Inc. ("Trendi").

2. Due to Bank of Baroda's wrongful denial of credit to Indu Craft, Indu Craft (a) sued Bank of Baroda on October 15, 1987, but (b) substantially failed to deliver the Garments to Trendi as promised.

3. If Indu Craft had delivered the Garments as promised, Trendi would have sold those Garments for $10,035,816.16.

Appendix

4. Trendi lost gross profits in the amount of $2,818,640.66 due to Indu Craft's failure to deliver the Garments.

5. Trendi attempted to mitigate its damages caused by Indu Craft's failure to deliver the Garments.

6. For mitigating its damages, Trendi purchased Garments worth $2,597,553.77, from overseas manufacturers.

7. Indu-Craft's failure to deliver as promised caused a significant delay in Trendi delivering the Garments to its customers, since Trendi had to arrange for financing, processing, and delivery of the Garments from overseas manufacturers itself.

8. Due to the delay occasioned by Indu Craft's failure to deliver the Garments as promised ("Delay"), Trendi's deliveries to its customers were in turn delayed.

9. Due to the Delay, Trendi was unable to sell the Garments at the price it could have otherwise charged to its customers.

10. Due to Trendi's delay in delivery, caused by Indu Craft's Delay, Trendi could not get reorders from its customers.

11. Due to the Delay, several of Trendi's customers canceled their orders.

12. As a result of such cancellations, Trendi had to sell significant quantities of Garments at reduced prices to new buyers.

Appendix

13. Due to the Delay, Trendi also had to give significant discounts and rebates to those of its customers who did not cancel their orders.

14. Due to the Delay, Trendi was unable to sell significant quantities of those Garments quickly.

15. Due to the Delay, Trendi was not able to sell about two thirds of the Garments by October 15, 1987.

16. If Indu Craft had delivered the Garments as promised, Trendi could and would have sold the Garments by October 1987.

17. As a result, Trendi had to store significant quantities of those Garments in warehouses and sell them at distress prices as late as 1988 and 1989.

18. Trendi sold these Garments for the sum of $2,365,583.82.

19. As a result, Trendi lost $231,968.95 in attempting to mitigate its damages.

20. Trendi's gross losses due to Indu Craft's failure to deliver the Garments according to contract were $3,050,609.61 (=$2,818,640.66 + $231,968.95).

21. If Indu Craft would have performed as contracted, Trendi's additional variable expenses attributable to Trendi's performance (including, for example, shipping, processing, and other overheads) would have been $273,581.66.

22. Trendi's net losses, i.e., gross profits less variable costs, attributable to Indu Craft's failure to deliver the Garments as promised amounted to $2,777,027.95 (= $3,050,609.61 - $273,581.66) as of December 31, 1987.

23. With simple interest, Trendi's damages (net losses) amount to $5,169,437.53 as of July 28, 1997, the date Indu Craft, Inc. filed the underlying petition for bankruptcy with this Court.

24. Due to Indu Craft's failure to deliver the Garments as promised, Trendi was unable to fulfill its financial obligations to BOI.

25. As a result, BOI sued Trendi, and entered judgment against Trendi for $2,244,895.19 in the United States District Court for Southern District of New York on April 22, 1991 ("Judgment").

26. Together with interest, Trendi's liability under this judgment is now estimated at $4,293,990.64, with interest at 9% p.a. from October 26, 1998.

27. Moreover, BOI debited Trendi's account for $397,055.00 towards the purchase price of Garments ordered by Trendi from abroad.

28. However, BOI did not permit Trendi to take delivery of the said Garments worth $397,055.00 due to Trendi's default caused by Indu Craft.

29. As a result, Trendi was unable to receive delivery of Garments worth $397,055.00 which it had ordered and become liable for.

30. With interest from the date of entry of Judgment, this claim amounts to $621,073.43, as of July 28, 1997.

31. Indu Craft's breach of the contract led to Trendi losing creditworthiness, tremendous goodwill, and customer confidence, so much so that Trendi's business was destroyed.

32. Trendi's damages attributable to the destruction of its business are $8,225,000 as of December 31, 1987.

33. With interest, these damages of Trendi amount to $15,310,837.51 as of July 28, 1997.

Dated this 10th day of June, 1999.

Robinson Brog Leinwand Greene Genovese & Gluck P.C.

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DECISION AND ORDER RESOLVING CLAIMS OBJECTION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 12, 1999

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11

Case No.: 97-B-44958 (JHG)

In re:

INDU CRAFT, INC.,

Debtor.

DECISION AND ORDER RESOLVING CLAIMS OBJECTION

JEFFRY H. GALLET
UNITED STATES BANKRUPTCY JUDGE

BACKGROUND

On July 25, 1997 Indu Craft, Inc., the debtor and debtor in possession (the "Debtor") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code. On September 8, 1997, Trendi Sportswear, Inc. ("Trendi") filed a Proof of Claim in this Court asserting an unsecured claim, in an unknown amount (hereinafter the "Claim". By notice of motion dated July 30, 1998 the Debtor objected to certain claims including Trendi's Claim based on the fact

that it was filed in an undetermined amount. Trendi thereafter submitted numerous documents, along with a Memorandum of Law and Affidavit of Ronald Quintero and Jagdish Patel, in support of Trendi's Claim. A Joint Statement of Facts ("JSOF") along with separate legal briefs of Trendi and Indu Craft were filed with the Clerk's office on June 10, 1999. Response papers were filed by Trendi only. The papers reflect Indu Craft's liability to Trendi. Thus, the only issue before me is the amount of Trendi's claim.

DISCUSSION

Trendi claims that it is entitled to $21,101,348.47, which represents a business venture gone bad. Indu Craft claims the amount of damages should be $20,480,275.04. There is a $621,073.43 difference. This amount reflects mitigation damages plus interest up to the date of filing the petition. In the JSOF the parties stipulated to the fact that Trendi suffered mitigation damages and to the amount of these damages. Indu Craft however, failed to include this figure in their calculation of damages, and furthermore offers no arguments as to why Trendi should not receive this $621,073.43. Based upon this stipulation I find that Trendi's claim should be $21,101,348.47.

It is unclear from Trendi's papers whether it is seeking post petition interest on its claim. It is a fundamental principle of bankruptcy law, however, that unsecured creditors are not entitled to post petition interest. *See Kitrosser v. CIT Group/ Factoring, Inc.*, 177 B.R. 458, 467 (Bankr. S.D.N.Y. 1995); *In re Pine Lake Village Apartment Co.*, 19 B.R. 819, 826 (Bankr. S.D.N.Y. 1982).

CONCLUSION

Trendi's claim in this proceeding shall be fixed at $21,101,348.47 and shall not accrue interest, post petition.

So Ordered.

Dated: New York, New York
July 12, 1999

s/ Jeffry H. Gallet
Jeffry H. Gallet
United States Bankr. Judge

FINAL DECREE OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 17, 2000

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Confirmed Chapter 11

Case No.: 97-B-44958(JHG)

In Re:

INDU CRAFT, INC.,

Debtor.

FINAL DECREE

Upon the application of the **Indu Craft, Inc.,** the above-captioned debtor (the "Debtor"), dated May 15, 2000 (the "Application"), by its attorneys, **Robinson Brog Leinwand Greene Genovese & Gluck P.C.,** for an Order granting a Final Decree in this case; and it having been represented and it appearing that the estate of the Debtor has been fully administered and the initial distributions required pursuant to the Debtor's confirmed plan of reorganization, (the "Plan") have been made to all Creditors at their last known addresses; and it also appearing that notice of the submission of the Application and service of a copy thereof was duly and timely made upon the Office of the United States Trustee, and that no objection was made to granting the relief requested therein, and sufficient cause appearing to me therefor, it is

ORDERED, that, as provided for in the Plan, the Debtor is discharged and released from any and all claims of creditors; and it is further

ORDERED, that, in accordance with the Plan, the holders of claims against the Debtor are enjoined and restrained from instituting or continuing any action to collect such debts; and it is further

ORDERED, that the above-captioned Chapter 11 Case be, and it hereby is, closed.

DATED: New York, New York
May 17, 2000

s/ Jeffry H. Gallet
Honorable Jeffry H. Gallet
United States Bankruptcy Judge

(3)

NOV 19 2003

No. 03-541

In the

Supreme Court of the United States

TRENDI SPORTSWEAR, INC.,

Petitioner,

v.

BANK OF INDIA, INDU CRAFT, INC.,
The BANK OF BARODA,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF

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PRELIMINARY STATEMENT

We identified three important issues warranting review by this Court. As discussed below, Baroda fails to address the nub of any of them.

ARGUMENT

1. The Impermissible Collateral Attack on a Confirmed Reorganization Plan Was an Extreme Departure from Well-settled Practice Warranting Review

Baroda and the lower courts simply ignore[1] the Bankruptcy Court's findings, TP[2], 8-23, and its underlying obligation to determine the validity of claims. Indisputably, the entire reorganization plan duly confirmed by the Bankruptcy Court stands unraveled by the Decisions. This departure from well-established law and practice is an issue of tremendous public importance today,[3] given giant bankruptcies such as K-Mart, UAL,

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[1]Baroda focuses on Indu Craft's disclosures concerning an earlier proposed reorganization plan (which plan Trendi never agreed to, and which plan was never approved by the Court). That proposal was modified to meet Trendi's insistence that its claims against Indu Craft, and prosecution of the claims herein against Baroda, be expressly provided for. Upon this being stipulated to, Trendi conditionally accepted the plan subject to approval of the Bankruptcy Court and its inclusion in the modified reorganization plan.

[2]"TP" refers to Trendi's "Petition for a Writ of Certiorari" of October 6, 2003; and "BR" refers to Baroda's undated "Brief in Opposition."

[3]Baroda's reliance on 80 year old cases for standards governing this petition, BR, 10, is misplaced given the codification in Rule 10, S.Ct. Rules.

and Conseco, and the continuing increase in bankruptcy filings.[4] Creditors ***must*** be able to rely upon the integrity of confirmed reorganization plans; the prospect of such plans being reopened in proceedings where they cannot even participate is too serious a systemic threat to ignore.

Baroda says nothing about the fact that (a) continued prosecution of Indu Craft's claims against Baroda were pivotal to that plan, TP, 8-10; (b) the lower courts could not selectively nullify portions of the plan, TP, 11-14; c) the Decisions negated factual findings of the Bankruptcy Court, TP, 14-17; and (d) any apparent conflict between the Bankruptcy Judgment and the plan had to be resolved by the Bankruptcy Court in the first instance, TP,18-22. Nevertheless, Baroda claims that the Decisions were "garden variety common law principles," BR, 1. But that does not prevent it from being a collateral attack: If these "principles" absolved Indu Craft of all liability, the Bankruptcy Court was duty bound to disallow Trendi's claim. Lesser v. Gray, 236 U.S. 70, 74 (1915) ("When an alleged debt or obligation is ascertained to be invalid -- without lawful existence -- the claim based thereon is ***necessarily disallowed***," emphasis added); Pepper v. Litton, 308 U.S. 295, 305 (1939) (same). Instead, that Court allowed Trendi's claim, quantified it and entered judgment thereon, necessarily finding that Indu Craft had ***not*** been absolved. In re Galletti, 298 F.3d 1107, 1110 (9th Cir. 2002).

Baroda scrupulously avoids addressing this critical issue: Why, if the Plan discharged Indu Craft of its liability to Trendi, did the Bankruptcy Court go to such

---

[4] 13 of the 20 largest bankruptcies since 1980 were filed in the last two years. BankruptcyData.com. Bankruptcy filings increased by 40.96% from first quarter of 2000 to 2nd quarter of 2003. TP, 18 n.5.

great lengths in calling for and reviewing submissions, determining the damages, and entering judgment against Indu Craft on that liability 10 months after the Plan?

So also, Baroda repeats the District Court's sophistic reasoning that the Bankruptcy Judgment was valid as against Trendi but unenforceable against Indu Craft. But it offers neither precedent nor principle in support of such a schizophrenic judgment, TP, 22-23, an unheard-of concept in the law which is productive of great mischief.

Baroda blithely asserts that the Bankruptcy Court's judgment in favor of Trendi was a "collusive judgment", BR, 7 n.6.[5] However, Baroda advisedly does ***not*** impugn its validity.[6] As this Court held in Dickerman v. Northern Trust Co., 176 U.S. 181, 189-90 (1900),

> We have no doubt that this judgment was collusive in the sense that it was obtained by the plaintiff and consented to by the defendant company for the purpose of

---

[5]Baroda misleadingly points out that the Bankruptcy Court was "very, very nervous" due to perceived "insider problems". BP, 3 n.3. But the Bankruptcy Court's concern was expressed in connection with the then-proposed reorganization which that Court never approved. Baroda ignores that having expressed such strong reservations, obviously, the Bankruptcy Court would have necessarily reviewed with extraordinary meticulousness the reorganization plan which it did approve.

[6]Baroda continually refers to Trendi and Indu Craft misleadingly as "sister" corporations, although their affiliation ceased long ago and Indu Craft's sole shareholder has been a Hong Kong corporation called Tze Wung Consultants. Bank of India v. Trendi Sportswear, Inc., 2002 U.S. Dist. LEXIS 894, at *2 n.1 (S.D.N.Y. Jan. 18, 2002).

> giving the trustees a legal excuse for declaring the principal and interest of the mortgage to be due, and to give authority for a foreclosure. But ***this did not constitute collusion in the sense of the law***, . . .
> Collusion . . . ***implies the existence of fraud of some kind***, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose; but ***if the action be founded upon a just judgment, and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defence that the plaintiff may have had some ulterior object*** in view beyond the recovery of a judgment, so long as such object was not an unlawful one.

Here also, Indu Craft ***had*** no defense to Trendi's claim, and was duty bound to concede, consistent with the dictates of Rule 11, Fed. R. Civ. P. See Ayers v. C&D Gen. Contrs., 269 F. Supp. 2d 911 (W.D. Ky. 2003) (consent judgment for $1 million on condition that it may be enforced only against insurance company, not against judgment debtor; not necessarily void). Thus, the fact that Indu Craft did not waste resources in fruitless litigation is irrelevant.

2. The Lower Court's Decisions' Conflict with the New York Court of Appeals' Decision In ***Duffy*** Should Be Reviewed by this Court

The Decisions conflict with the decision of New York's highest Court in Duffy v. Horton Memorial Hospital, 66 N.Y. 2d 473, 497 N.Y.S.2d 890 (N.Y. 1985), on the relation back of third party claims. Baroda disputes this because Duffy involved an amendment of an existing

pleading, rather than a separate pleading. This exalts form over substance, contrary to settled law, Mitchell v. Helms, 530 U.S. 793, 858 (2000); Robinson v. Glynn, 2003 U.S. App. LEXIS 23135, *22 (4th Cir. Nov. 13, 2003). Whether the document asserting a claim is called an amended complaint or a second complaint is irrelevant to the substance of the claim.

Unlike Rule 14, Fed. R. Civ. P., New York state procedure mandates that such claims be made only through an amendment, not a direct pleading. N.Y. C.P.L.R. §1009; Duffy, 497 N.Y.S.2d at 892. This procedural detail does not affect the limitations period governing the diversity claims. "The fact that under New York law a statute of limitations might be lengthened or shortened, . . . are all matters of local law properly to be respected by federal courts sitting in New York . . ." Guaranty Trust Co. v. York, 326 U.S. 99, 107 (1945). The Decisions here refused to do so, directly contradicting Duffy, 497 N.Y.S.2d 890.

Baroda also boldly asserts that it had "no notice that it would be subjected to claims by Trendi" until July 30, 2001, BR, 21, and that the lower courts had "implicitly" so found, which factual "finding" cannot be reviewed by this Court. This is frivolous:

> It is evident that ***when a third party has been served with the third-party complaint, and all prior pleadings in the action as required by CPLR 1007, the third-party defendant has actual notice of the plaintiff's potential claim at that time.*** The third-party defendant must gather evidence and vigorously prepare a defense. There is no temporal repose.

Duffy, 497 N.Y.S.2d at 894. Thus, Baroda had "notice" as a matter of law. Moreover, Baroda does ***not*** (and cannot) claim that it was prejudiced by any alleged lack of notice.

Baroda's own unequivocal assertions in its 1990 memorandum seeking stay of this action demonstrate its awareness conclusively.[7] As the Second Circuit observed in its previous opinion herein, Baroda had "argued that both the fourth party action and the pending 1987 Action involved "virtually the same parties, . . . arise out of the

---

[7]For example, Baroda repeatedly emphasized that Indu Craft and Trendi were but one and the same:

> It is irrelevant that Indu Craft sues directly in the 1987 action and alleges its claims against [Baroda] as indemnity causes of action in the instant action. . .
>
> ********** ********** **********
>
> [Baroda would be extremely prejudiced should it be forced to defend two actions arising from ***the same facts and circumstances and involving the same issues brought by the same plaintiff***.
>
> ********** ********** **********
>
> The third party and fourth party actions are merely a sham concocted by Mehta to attempt to avoid liability to BOI ***by passing Trendi's debts through his various corporations to [Baroda]***.

App. 21a-22a (Baroda's Memo in Support of Motion for Dismiss/strike/stay, of August 10, 1990) (emphasis added). See also, App. 17a (Baroda's Memo in Opposition to Indu Craft's Cross-motion to Sever and Consolidate) ("Indu Craft chose to allege its claims for Trendi's damages in a separate action commenced almost three years after the 1987 Action was commenced . . ."). The third party complaint, App. 1a, as well as the fourth party complaint, App. 6a-11a, themselves gave abundant notice to Baroda of the claims at bar.

same facts and circumstances, . . . [and] involve the same claims," and that Indu Craft would not be prejudiced by dismissing or staying the fourth party action pending resolution of the 1987 Action." Bank of India v. Trendi Sportswear, Inc., 239 F.3d 428, 433 (2nd Cir. 2000). Baroda knew that "Indu Craft ceased operations in November 1987," Indu Craft v. Bank of Baroda, 47 F.3d 490, 493 (2nd Cir. 1995) – 3 years before this proceeding.

3. The Variation of Limitations Period Governing Rule 14 Claims Is an Important Question of Federal Law Which Should Be Decided by this Court

The Decisions made the limitations period for direct claims under Rule 14 claim vary depending on how it was asserted. TP, 25-30. Baroda's ***only*** response[8] is that Trendi somehow "misunderst[ood]" underlying principles, BR, 23, thereby implicitly conceding the point.[9]

---

[8]Baroda also asserts that Trendi is not a "party" herein in view of the Bankruptcy Judgment, BR, 23 n.12, although the District Court never dismissed Trendi from this case or transferred the third party complaint to the Bankruptcy Court. Transfer of a claim requires a ***specific*** order. Sterling Consulting Corp. v. United States, 245 F.3d 1161, 1167 (10th Cir. 2001), cert denied, 534 U.S. 1114 (2002). Absent such a transfer, Trendi's third party complaint cannot be said to have "merged" in the Bankruptcy Judgment. Trendi continued to be a party here. It could have amended its third party complaint, and hence, can raise the viable issue of applicable limitations period.

[9]Baroda concedes that Section 524 (e) "is intended to benefit creditors," BR, 13, but nevertheless Baroda claims that "it was not Trendi, but Indu Craft that sought to rely upon" that provision. Id. In fact, Trendi did rely on that provision; to avoid repetition, Trendi has consistently adopted Indu Craft's arguments in the lower courts. Indu Craft was fulfilling its legal obligation under the plan to prosecute its claims herein in good faith.

CONCLUSION

The Petition should be granted with respect to the issues raised.

Dated: New York, New York
November 18, 2003

Chittur & Associates, P.C.
By: Krishnan Chittur, Esq.
The Lincoln Building 15th Floor
60 East 42nd Street 1501
New York, NY 10165
Tel: (212) 370-0447

Attorneys for Petitioner Trendi Sportswear, Inc.

CIVIL ACTION NO.
THIRD-PARTY COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintif,

-against-

TRENDI SPORTSWEAR, INC.,
Defendant and Third-Party Plaintiff,

-against-

INDU CRAFT, INC,
Third-Party Defendant,

Defendant and Third-Party Plainfiff Trendi Sportswear, Inc. ("Trendi"), by its attorneys, Crowell, Rouse & Matera, as and for its Third-Party Complaint herein, allegs as follows:

COUNT I

1. Plaintiff, Bank of India, has filed a complaint against Defendant, Trendi, a copy of which is hereto attached as Exhibit 1. Trendi interposed its answer thereto, a copy of which is annexed as Exhibit 2.

2. Trendi is a wholesaler and importer of garments, in particular, ladies ready made garments.

3. Third-Party Defendant Indu Craft, Inc. ("Indu Craft"), imports such garments from India and the Far East and was Trendi's major supplier over a period including 1984 through 1987.

4. Indu Craft contracted to supply Trendi with garments for 1987, which were due to be shipped to the United States.

5. Beginning on or about May, 1987, Indu Craft breached its contract to supply such goods, allegedly because it was unable to obtain letters of credit for the benefit of its overseas suppliers, and either failed to deliver goods to Tendi or delivered goods late.

6. Trendi sought an increased line of credit from plaintiff, Bank of India, so that it could import the goods itself in an effort to mitigate its damages.

7. Because of the delay caused by Indu Craft's breach, Trendi was unable to import garments it had ordered, rendering it unable to achieve its projected sales on its seasonal merchandise and, with respect to garments received late, in many instances had to sell the same at reduced and even distress prices.

8. Many of Trendi's customers cancelled their orders due to the delay in receiving the goods caused by Indu Craft's breach.

9. Trendi was damaged as a result of Indu Craft's breach, and consequently lacks financial means to fulfill its alleged obligations to plaintiff, Bank of India.

10. If Trendi is adjudged liable to plaintiff Bank of India in this action, it will have suffered damages, as a direct and proximate result of Indu Craft's breach of contract, equal to the amount of such judgment, which damages it hereby claims, together with interest, its costs, expenses and attorneys' fees.

COUNT II

11. Trendi repeats and realleges as if fully set forth herein the allegations contained in paragraphs 1 through 10, inclusive, hereof.

12. Indu Craft was aware of the nature of Trendi's business through the prior course of dealings and close relationship between the two companies.

13. Indu Craft knew that any delay in supplying goods to Trendi would cause Trendi to suffer lost profits.

14. The total cost of the goods which Trendi contracted to purchase from Indu Craft was $7,217,175.50.

15. The total estimated sales Trendi would have achieved for the goods, had Indu Craft supplied them on time, is $10,035,816.16.

16. As a direct and proximate result of Indu Craft's breach of contract, as aforesaid, Trendi has been damages in the amount of $2,818.640.66, representing its lost profits as nearly as now can be est imated.

COUNT III

17. Trendi repeats and realleges as if fully set forth herein the allegations contained in paragraphs 1 through 16 inclusive, hereof.

18. In the garment industry, goodwill and reputation are critical to the sucess of a business.

19. Indu Craft knew that its failure to deliver the goods to Trendi as promised would result to damage to Trendi's business reputation for reliability among its customers.

20. Trendi has been damaged as a direct and proximate result of Indu Craftf's breach in the amount of $2,300,000.00, as nearly as now can be estimated, representing loss of its business reputation and goodwill.

WHEREFORE, Trendi demands judgment against third-party defendant Indu Craft, Inc., with respect to Count I hereof, for all sums that may be adjudged against defendant Trendi in favor of plaintiff Bank of India; with respect to Count II hereof, for damages in the amount of $2,818,640.66, with respect to Count III hereof, for damages in the amount of $2,300,000.00, together with such further or different relief as the Court may deem just and proper.

Dated: New York, New York
May 14, 1990

CROWELL, ROUGE & MATERA
By: Francis R. Matern
Attorneys for Defendant,
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111 Broadway
New York, New York 10016
212-732-3464

89 Civ. 5996 (SWK)
FOURTH-PARTY COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintiff

-against-

TRENDI SPORTSWEAR, INC.,
Defendant and Third-Party, Plaintiff,

-against-

INDU CRAFT, INC.,
Third-Party Defendant and Fourth-Party Plaintiff,

-against-

BANK OF BARODA,
Fourth-Party Defendant.

Third-Party Defendant and Fourth-Party Plaintiff Indu Craft, Inc. ("Indu Craft") by its attorneys, Eaton & Van Winkle, as and for its Fourth-Party Complaint herein, alleges as follows:

COUNT I

1. Plaintiff, Bank of India, has filed a complaint against Defendant, Trendi Sportswear, Inc. ("Trendi"), a copy of which is annexed hereto as Exhibit 1. Trendi

interposed its answer thereto, a copy of which is annexed hereto as Exhibit 2.

2. Trendi has filed a Third-Party Complaint against Indu Craft, a copy of which is annexed herato as Exhibit 3. Indu Craft interposed its answer thereto, a copy of which is annexed hereto as Exhibit 4.

3. Third-Party Defendant Indu Craft imports ladies ready made garments from India and the Far East and was Trendi's major supplier over a period including 1984 through 1987.

4. Indu Craft contracted to supply Trendi with garments for 1987, which garments were due to be shipped to the United States, and Fourth-Party Defendant Bank of Baroda ("Baroda") knew of such ongoing supply contracts.

5. The seasonal nature of the garments ordered from Indu Craft by Trendi made time of the essence in connection with the contracts between Trendi and Indu Craft and Baroda knew or reasonably should have known that time was of the essence.

6. Beginning in or about May, 1987, Indu Craft became unable to supply such goods because Fourth-Party Defendant Baroda wrongfully, maliciously, without justification and/or in bad faith curtailed, limited, abridged and/or terminated certain credit privileges which Indu Craft had established over a period of years with Baroda and upon the continuation of which Indu Craft justifiably relied in placing orders with overseas manufacturers for goods ordered from

Indu Craft by Trendi and of which reliance Baroda had actual or constructive knowledge.

7. As a direct and proximate result of Baroda's actions, as aforementioned, Indu Craft was denied letters of credit for the benefit of its overseas suppliers by Baroda or such credit was materially delayed, and as a direct result Indu Craft either failed to deliver goods to Trendi or delivered goods late.

8. Trendi has claimed it was damaged as a result of Indu Craft's failure to deliver or to deliver timely the goods ordered by Trendi and has claimed that it consequently lacks financial means to fulfill its alleged obligations to plaintiff, Bank of India,

9. If Indu Craft is adjudged liable to third-party plaintiff Trendi in this action, it will have suffered damages, as a direct and proximate result of Baroda's tortious interference with contract, equal to the amount of such judgment, which damages it hereby claims, together with interest, its costs, expenses and attorneys' fees.

COUNT II

10. Indu Craft repeats and realleges as if fully set forth herein the allegations contained in paragraphs 1 through 9, inclusive, hereof.

11. Baroda and Indu Craft had a contract to establish and continue credit privileges for Indu Craft's commercial use, which contract Baroda breached by the aforementioned conduct.

12. If Indu Craft is adjudged liable to third-party plaintiff Trendi in this action, it will have suffered damages, as a direct and proximate result of Baroda's breach of its contract with lndu Craft, equal to the amount of such judgment, which damages it hereby claims, together with interest, its costs, expenses and attorneys' fees.

COUNT III

13. Indu Craft repeats and realleges as if fully set forth herein the allegations contained in paragraphs 1 through 12, inclusive, hereof.

14. Baroda was awareof the nature of Indu Craft's and Trendi's businesses and the close relationship between the two companies through its prior course of dealings with both lndu Craft and Trendi .

15. Baroda knew that any delay in providing credit to Indu Craft in the form of Letters of Credit in favor of overseas manufacturers would delay or prevent Indu Craft from supplying goods to Trendi and would thereby cause Trendi to suffer lost profits.

16. Trendi has claimed the total cost of the goods which Trendi contracted to purchase from Indu Craft was $7,217,175.50.

17. Trendi has claimed the total estimated sales Trendi would have achieved for the goods, had Indu Craft supplied them on time, was $10,035,816.16.

18. Trendi has claimed that as a direct and proximate result of Indu Craft's alleged breach of

contract, Trendi has been damaged in the amount of $2,818.640.66, representing its estimated lost profits.

19. If Indu Craft is adjudged liable to Trendi for its lost profits claimed in this action, as aforesaid, it will have suffered damages, as a direct and proximate result of Baroda's conduct, equal to the amount of such judgment, which damages it hereby claims, together with interest, its costs, expenses and attorneys' fees.

COUNT IV

20. Indu Craft repeats and realleges as if fully set forth herein the allegations contained in paragraphs 1 through 19, inclusive, hereof.

21. In the garment industry, goodwill and reputation are critical to the success of a business.

22. Baroda knew that its interference with Indu Craft's credit facility in 1987, as aforesaid, would harm lndu Craft's ability to deliver the ordered goods to Trends and would result in damage to Trendi's business reputation for reliability among it customers.

23. Trendi has claimed it has been damaged as a direct and proximate result of Indu Craft's alleged breach of contract in the amount of $2,300,000.00, as nearly as now can be estimated, representing loss of its business reputation and goodwill.

24. If Indu Craft is adjudged liable to Trendi for its loss of business reputation and goodwill claimed in this action, it will have suffered damages, as a direct and proximate result of Baroda's conduct, equal to the

amount of such judgment, which damages it hereby claims, together with interest, its costs, expenses and attorneys' fees.

WHEREFORE, fourth-party plaintiff, Indu Craft, Inc., demands judgment against fourth-party defendant Bank of Baroda with respect to Counts I, II, III and IV hereof, for all sums that may be adjudged against it as third-party defendant Indu Craft in favor of third-party plaintiff Trendi Sportswear, Inc., together with interest, its costs, expenses and attorneys' fees and such further or different relief as the Court may deem just and proper.

Dated: New York, New York
June 21, 1990

EATON & VAN WINKLE
By: Jonathan A. Chase (JC 8291)
Attorneys for Defendant,
Trendi Sportswear ,Inc.
600 Third Avenue
New York, New York 10016
(212) 867-0606

Chapter 11
Case No. 97 B 44958 (JHG)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
In re
INDU CRAFT, INC.
Taxpayer I.D. No. 13-3048561,
Debtor.

DISCLOSURE STATEMENT FOR PLAN OF REORGANIZATION OF INDU CRAFT, INC.

THIS IS NOT A SOLICITATION OF ACCEPTANCES OR REJECTIONS OF THE PLAN. ACCEPTANCES OR REJECTIONS MAY NOT BE SOLICITED UNTIL A DISCLOSURE STATEMENT HAS BEEN APPROVED BY THE BANKRUPTCY COURT. THIS DISCLOSE STATEMENT IS BEING SUBMITTED FOR APPROVAL, BUT HAS NOT BEEN APROVED BY THE BANKRUPTCY COURT.

ROBINSON BROG LEINWAND GREENE GENEVESE & GLUCK P.C.
Attorneys for the Debtor
1345 Avenue of the Americas
New York, New York 19105-0143
(212) 586-4050

Of Counsel: A. Mitchell Greene, Esq.
Michael S. Schreiber, Esq.

Dated: New York, New York
November 20, 1997

Additionally, on June 21, 1990, the Debtor filed a fouth-party complainst against Bank of Baroda ("Baroda II") claiming that any damages that it was required to pay to Trendi were proximately caused by Bank or Baroda's bad faith actions and that Bank of Baroda should be required to pay the Debtor any sums that the Debtor was required to pay to Trendi.

On or about August 13, 1990, Bank of Baroda filed a motion in Baroda II seeking the entry of an order pursuant to Rule 12(b) and 14(a) of the Federal Rules of Civil Procedure dismissing the fourth-party complaint or staying Baroda II from proceeding until the Baroda Action was resolved by the entry of a final judgment, alternatively, Bank of Baroda sought an order dismissing the fourth-party complaint for failing to meet technical requirements governing impleader actions. In short, Bank of Baroda sought a stay of proceedings in Baroda II because it alleged the causes of action alleged in Baroda II were based upon the same facts and circumstances alleged in the Baroda Action and Baroda II was nothing more than a repetition of the Baroda Action.

In response thereto, on September 18, 1990, the Debtor filed a cross-motion seeking the entry of an order pursuant to Rule 42 of the Federal Rules of Civil Procedure severing Baroda II from the Trendi Action and consolidating Baroda II with the Baroda Action. In particular, the affidavits submitted in support of the Debtor's cross-motion noted that although the claims for liability raised in Baroda II were essentially identical with those raised in the Baroda Action, the damages claimed in Baroda II were entirely distinct. As set forth therein, the damages incured by Trendi for

which claims had been asserted by Trendi against the Debtor and by the Debtor against the Bank of Baroda, had not been included in the statement of damages provided in the Baroda Action.

After a hearing held on October 5, 1990, the District Court ordered that the proceedings in Baroda II be stayed pending a resolution of the Baroda Action. That stay has never been lifted.

The jury in the Baroda Action specifically found that in Marh 1987 the Debtor had existing, valid contracts with Trendi and that Bank of Baroda and Chokshi were aware of the existence of such contracts. The Debtor was not permitted to submit evidence in the Baroda Action with respect to the damages asserted in Baroda II.

The Debtor believes that the judgment in the Baroda Action will collaterally estop Bank of Baroda from denying liability in Baroda II and all that remains to be litigated is the amount of damages. Accordingly, the Debtor is considering whether and how to obtain a modification of the stay in Baroda II so that these issues can be litigated. Additionally, the Debtor may seek to amend its fourth-party complaint in Baroda II to state a cause of action against Bank of Baroda for treble damages under the Racketeer Influenced and Corruption Organization ("RICO") statutes.

The IRS, the City and the State. The Debtor is a "C" corporation fiing tax returns on a calendar year basis. For the year ending December 31, 1985, the Debtor had taxable income of $729,153 and owed federal income taxes of $314,420. Although a Form 1120 tax return

was filed with the IRS, the taxes for this period were not paid and remain outstanding. The IRS has asserted

Copies of all pleadings, orders, lists, schedules, proofs of claims or other documents submitted in these cases are on file in the Office of the Clerk of the United States Bankruptcy Court at Alexander Hamilton Custom House, One Bowling Green, New York, New York, 10004, and are available for public inspection Monday through Friday, between the hours of 9:30 a.m. and 12:00 noon and 1:30 p.m. and 4:30 p.m.

CONCLUSION

The Debtor believes the Plan is in the best interests of all Creditors and Interest Holders and strongly encourages all holders of Claims against and Interests in the Debtor to vote to accept the Plan and to evidence such acceptances by promptly returning their Ballots to ensure that they will be received not later that 5:00 p.m., Eastern Standard Time, on _____, 1998.

Dated:New York, New York
November 29, 1997

INDU CRAFT, INC.
By: Hemant Mehta, its President

ROBINSON BROG LEINWAND GREENE GENEVESE & GLUCK P.C.
By: Michael S. Schreiber, Esq. (MSS-5398)
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89 Civ. 5996 (JSM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintiff,

-against-

TRENDI SPORTSWEAR, INC.,
Defendant and Third-Party, Plaintiff,

-against-

INDU CRAFT, INC.,
Third-Party Defendant and Fourth-Party Plaintiff,

-against-

BANK OF BARODA,
Fourth-Party Defendant.

BANK OF BARODA'S MEMORANDUM IN OPPOSITION TO INDU CRAFT'S CROSS-MOTION TO SEVER AND CONSOLIDATE AND IN FURTHER SUPPORT OF BANK OF BARODA'S MOTTON TO DISMISS OR STAY THE FOURTH-PARTY ACTTON, OR STRIKE THE FOURTH-PARTY COMPLAINT

Constance M. Boland
Catherine A. Diviney
Of Counsel

September 8, 1989, when BOI commenced the instant action, Boland Sept. Aff. ¶ 4, Indu Craft failed to assert that claim in the 1987 Action. Instead, it chose to allege its claims for Trendi's damages in a separate action commenced almost three years after the 1987 Action was commenced and after its complaint in that action was dismissed. Now, Indu Craft cannot attempt to delay the entry of judgment against it in the 1987 Action by seeking consolidation of its fourth-party claim. Indu Craft, in effect, turns judicial economy on its head.

(3) Consolidation Will Result In Significant Delay, Confusion and Prejudice to the Bank

In its motion papers, Indu Craft claims that consolidation will avert delay, confusion or prejudice. Cross-Motion Mem. at 6-8. As, even Indu Craft admits, id. at 8, this is wrong.

First, consolidation would cause delay. Id. Although Indu Craft focuses on the numerous similarities between the two actions in concluding that consolidation would cause no delay, it ignores the different damages claims in the two actions that it emphasizes so strongly in arguing against the Bank's motion to dismiss or stay. Id. at 7-8 and Opp. Mem at 2. It Indu Craft attempts to produce evidence of Trendi's damages in the 1987 Action, then a significant amount of discovery, including depositions and document production, must be completed before

Indu Craft, however, would not be prejudiced by the denial of consolidation. Should this Court strike the fourth-party complaint, Indu Craft may be able to bring a separate claim against the Bank if, and when, Trendi enters judgment against Indu Craft. If this Court stays the fourth-party action until judgment is entered in the 1987 Action, Indu Craft's claim for Trendi's damages would survive and any applicable rulings made in the 1987 Action would, govern the fourth-party action. Should this Court dismiss Indu Craft's fourth-party complaint, Indu Craft may not necessarily be precluded from recovering Trendi's damages in the 1987 Action.

In its motion papers, Indu Craft emphasizes that the Bank secured a "technical summary judgment" against it. Cross-Motion Mem. at 6, 7 and 8. Although there is no such term in the Federal Rules, Indu Craft apparently employs the adjective "'technical"' to imply that the Bank prevailed on its motion for partial summary judgment due to some technicality.[5] Nothing could be further from the truth. As

[5] Indu Craft magnanimously states that it "is willing to abide by a decision rendered in the Indu Craft action." Cross-Motion Mem. at 7. The purpose of this statement is unclear since it is obvious that non-compliance with an order of this Court would subject Indu Craft to contempt.

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89 Civ. 5996 (JSM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintiff,

-against-

TRENDI SPORTSWEAR, INC.,
Defendant and Third-Party, Plaintiff,

-against-

INDU CRAFT, INC.,
Third-Party Defendant and Fourth-Party Plaintiff,

-against-

BANK OF BARODA,
Fourth-Party Defendant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OR STAY THE FOURTH-PARTY ACTION OR, IN THE ALTERNATIVE, TO STRIKE THE FOUTHT-PARY COMPLAINT

David L. Hoffberg
Constance M. Boland
Of Counsel

¶¶ 25, 26-27, and 33-34. In the fourth-party complaint in the instant action, Indu raft summarizes its Amended Verified Complaint in the 1987 Action by alleging that

in or about May 1987 . . . Fourty-Party Defendant Baroda . . . limited, abridged and/or terminated certain credit privileges which Indu Craft had established over a period of years with Baroda . . .

Boland Aff. Ex. B ¶ 6. It is clear that in this summary in the fourth-party complaint, Indu Craft is referring to the same actions of the Bank described in more detail in the Amended Verfied Complaint in the 1987 Action.

Further, both actions involve the same claims. In the 1987 Action, Indu Craft sues for breach of the implied covenant of good faith and fair dealing, tortious interference with contract and prima facie tort. Boland Aff. ¶¶ 9-11. In the fourth-party complaint in the instant action, lndu Craft asserts that if

Indu Craft is adjudged liable to third-party plaintiff Trendi in this action, it will have suffered damages as a direct and proximate result of Baroda's tortious interference with contract . . . . Baroda's breach of its contract with Indu Craft . . . [and] Baroda's conduct . . .

Boland Aff. Ex. F ¶¶ 9, 12, 19 @ 24

It is irrelevant that Indu Craft sues directly in the 1987 Action and alleges its claims against the Bank as indemnity causes of action in the instant action. The gravamen

Fourth, due to the pending motions and the extensive discovery already completed in the 1987 Action, there is a greater likelihood of a prompt result in the 1987 Action. Fifth, the parties, counsel and witnesses would be significantly prejudiced and inconvenienced if they were forced to participate in additional and duplicative discovery and motion practice in the fourth-party action, when such discovery and motion practice has previously been conducted in the 1987 Action. Sixth, the Bank would be extremely prejudiced should it be forced to defend two actions arising from the same facts and circumstances and involving the sane issues brought by the same plaintiff. The Bank has already defended itself in the 1987 Action; Indu Craft should not be afforded a second bite of the apple in this fourth-party action.

Finally, it should be emphasized that this alleged fourth-party action is merely a procedural ploy used to revive Indu Craft's action against the Bank, which has already been dismissed twice by this Court. Trendi and Indu Craft are both solely owned by Hemant C. Mehta ("Mehta"). Mehta completely controls Trendi and Indu Craft. During the relevant time period, Trendi was Indu Craft's only customer, Boland Aff. ¶10. The, primary action is BOI's action on the credit facility with its former customer, Trendi. That claim is completely unrelated to the purported claims brought by Trendi and Indu Craft. The third-party and fourth-party actions are merely a sham concocted by Mehta to attempt to avoid liability to BOI by passing Trendi's debts through his various corporations to another bank. This Court should not tolerate such an abuse of the procedural mechanisms offered by the Federal Rules.

Indu Craft's fourth-party complaint should be dismissed.

POINT II

THE FOURTH PARTY COMPLAINT IS NOT A PROPER IMPLEADER COMPLAINT UNDER RULE 14 AND IT SHOULD BE STRIKEN

Rule 14(a) of the Federal Rules of Civil procedure provides that:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff . . . Any party may move to strike the third-party, claim . . . .

Fed. R. Civ. P. 14(a). Rule 14 was "designed to eliminate multiple and repetitive lawsuits and trials by allowing for a single presentation of evidence when multiple clamis turn upon identical or similar proof." National Bank of Canada v. Artex Indus, Inc., 627 F. Supp. 610, 613 (S.D.N.Y. 1986) (quoting Sirota v. Solitron Devices, Inc., 97 F.R.D. 732, 736 (S.D.N.Y. 1983)).

pending action or, in the alternative, to strike the fourth-party complaint for failing to meet the requirements of Rule 14(a).

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